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REPORT

ON THE

RIGHTS AND DUTIES

OF THE

President and Fellows of Harvard College

IN RELATION TO THE

BOARD OF OVERSEERS.

CAMBRIDGE:

METCALF AND COMPANY,

PRINTERS TO THE UNIVERSITY.

1856.



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Rights and Duties of the President and
Fellows of Harvard College. 1856.



Rights and Duties of the President and
Fellows of Harvard College. 1856.

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Overseers, and of the corresponding obligations to which the President and Fellows were invited to assent, and which were proposed to be the subjects of the joint rules which it was the only office of the two committees in joint session to provide, and considering also the very grave importance of them all, lying as they do at the foundation of the constitution of the College, and what seemed the novelty of some of them — were of course unprepared to act upon the question of establishing any such joint rules, without time for investigation into the proposed subjects of them ; — an investigation which it was supposed might necessarily require much time, it appearing that a period of nine months had been taken for that which had resulted in the above-mentioned Report, on the same subjects, adopted by the Board of Overseers.

Your Committee have not thought it worth their while to inquire into the causes of this movement on the part of the Board of Overseers, nor into the existence of any other supposed grievances than those intimated in the Report of their Committee, the nature of which will be presently considered. Nor are they aware of any difficulties or inconveniences which have recently been experienced in the intercourse between the two Boards, requiring the establishment of a code of laws for its regulation, which the experience of two centuries seems to show were not before thought necessary. The College certainly never was in a more prosperous condition ; it has never, in any period of its history, received more significant and gratifying proofs of public confidence and liberality than during the last ten years. Nor are the Committee aware of any complaint or embarrassment in the action of the two Boards, excepting in one instance, stated in the Report under consideration, and insisted on in one previously made in relation to an alleged irregularity, but which will be found in strict accordance with a general usage during the whole history of the College, and thus to have received the repeated sanction of the Board now making the imputation.

The intercourse between the two Boards for two centuries, with very few exceptions, has been eminently harmonious and honorable to both; and perhaps the more so from the absence of the desire on either side to enter into sharp definitions of reciprocal rights and obligations, which are rarely settled to mutual satisfaction by co-ordinate branches of government.

The Committee in their Report (pp. 3, 4) say: "It is somewhat remarkable, considering the various and important relations which exist between the Corporation and the Overseers, that from the beginning down to the present time, embracing a period of more than two centuries, not a single question touching the *relative powers, rights, and duties* of these two Boards has, so far as the Committee can learn, been brought to a legal decision, or been solemnly argued, or even presented by both parties in proper form for argument and adjudication." *

Your Committee cannot forbear the remark, that, if such be the history of the concurrent action of the two Boards for two centuries, and under which the College has advanced to its present unsurpassed eminence in the United States, and to the enjoyment of a degree of public confidence and liberality greater in the last quarter of a century than in any part of its previous history, it might lead its friends to doubt the expediency of awakening a discussion going to the foundation of all those relative powers, rights, and duties, the effects of which, in the possible controversies it may give birth to, and upon the position and character of the College, no one can foresee; and that they think it proper thus to record the fact, that it is not of the seeking of this Board, nor called for, as they believe, by any of its proceedings. But these questions being thus raised without the agency of this Board, its members can have no unwillingness to enter upon the fullest examination of them, having no motives nor interests but for the

* The italicizing in this and subsequent citations, unless otherwise denoted, is by the authors of the present Report.

ascertainment of the truth, and the establishment of the best interests of the College, the immediate administration of whose affairs they have hitherto supposed was intrusted to their care.

The Committee of the Overseers are pleased to admit that "the Corporation is a very important body in the constitution of the College, and has on many trying and difficult occasions during a period of two centuries been its bulwark." There is little reason to believe that such occasions will ever cease; and it is only to be hoped that its present and future members may continue to deserve the commendation thus bestowed upon the past, whenever any such may arise. Your Committee believe that the investigation thus called for by the Overseers must constitute a most important event, if not a crisis in the history of the College as deeply affecting its future welfare as any that has ever occurred in it. And they hope that they may be permitted, without disrespect to that honorable Board, to express their regret that the rights now asserted had not been made the subject of mutual investigation and inquiry by both Boards, instead of being thus constituted a portion of its organic law by one of them only, without reference to the other, and without, as the Committee are informed, any debate or deliberation by the Board when adopting the Report.

But these rights being asserted, and now insisted upon, by that Board, and the Corporation being called upon in a manner that allows of no alternative but that of admission or denial of them, nothing remains but a faithful inquiry into their validity, to which your Committee now humbly proceed. If, in the course of these remarks, they should express themselves with any seemingly undue earnestness or freedom, they trust that any such expressions will be attributed to the sincerity of their convictions, and their sense of the profound importance of the subject, and not to any the slightest intended disrespect to the Honorable the Board of Overseers, or the learned

Committee whose Report is thus inevitably brought under review.

The first and most essential step in this inquiry, is to ascertain and clearly define the nature and extent of the rights claimed for the Overseers in the Report under consideration.

These are nowhere distinctly set forth in precise articles or descriptions, but are to be gathered from somewhat general statements, and the collation of separate portions of the Report. They are, however, as is believed, described directly or incidentally with clearness and precision sufficient to leave no material doubt concerning them.

And here it should be premised, that the actual nature of any right claimed, and the extent to which, if existing, it may be lawfully carried and maintained at the will of the Overseers, is the only legitimate subject of inquiry; and not how far they would probably, or might reasonably, be expected to carry and maintain it; or how reasonable or useful the possession or exercise of such a right might be supposed to be in the particular cases or emergencies that have been in the Report, or may be elsewhere, suggested.

The rights claimed by the Overseers, and the corresponding obligations insisted upon as incumbent on the President and Fellows, are understood to be as follows:—

1. As to Finances. That the Corporation should not enter upon any unusual financial operation, such as the disposing of real estate in whole or in part, or erecting a new College hall, or chapel, or adopting any important change respecting the College funds, before making known their intentions to the Board of Overseers, so that they may express their approval, or interpose their objections, if they have any. And that this procedure is required by the constitution of the College, and necessary to give to the Overseers opportunity to exercise all the rights and powers belonging to them. (Report, pp. 9, 10.)

It is obvious, that, although the Committee seemingly confine the claim of the Overseers to the control of the finances of the College to cases of what they term unusual financial operations, all those named by way of illustration are such as are necessarily within the ordinary exercise of the duties of any College Corporation intrusted with its funds and the management of its affairs; and that such right of control, if existing, necessarily embraces all expenditures and investments of whatever nature. No line of distinction or exception is suggested in the Report. But it is manifest that, if this right belongs to the Overseers, it must be founded in the legislative acts establishing the two Boards, and there the distinction, if any such exists, can be shown. It is assuming nothing to say, that none has been or can be pointed out; and therefore that, if the authority exists in the Overseers to exercise this control in cases which they may from time to time be pleased to consider unusual, it does so equally in all others.

2. As to Donations. That official notice should be given to the Overseers by the Corporation of all gifts or bequests to the College; and that when any one is upon a particular condition, or accompanied by a special trust, the vote of the acceptance of the Corporation is not sufficient and complete until such vote is concurred in by the Overseers. (Rep. pp. 10, 11.) The Committee suggest a distinction between unconditional bequests or gifts and those attended with any qualification or special trust, not indeed as constituting any in the absolute right of the Overseers to object to its acceptance in the one case more than in the other, but merely as affecting the necessity of official notice to them. And it is undeniable, that, if they have such right in either case, they have it in both, for no such distinction can be found, or is pretended to exist, in the creation of their powers upon the subject of donations, under the Charters.

3. As to Appointments. That all appointments of instructors and officers of the College should be submitted to

the Overseers for confirmation; and that no such appointment takes effect until confirmation by them. (Rep. p. 14.)

4. As to Establishment of Professorships and other Offices. That when a new professorship or other office is established, it is incumbent upon the Corporation to send up the record of their action on the subject, and that the Corporation should not proceed to an election to fill any such professorship until its establishment shall have received the approval of the Overseers. And the sending up of such record, and the presenting of a vote appointing some one to fill the office, at the same time, is denounced as an irregularity of which the Corporation has been guilty, and which the Committee trust will not be repeated. (Rep. p. 14.)

5. As to Tenures of Office. That as a general rule the instructors or officers hold their offices during the pleasure of both Boards, and may be removed by them. And it is added, that, if by statute or vote a certain term or limited period is presented for an incumbent to hold any office, it is an irregularity for him to be permitted to remain in office after such term has expired; or for an appointee of the Corporation to continue as an instructor or officer after his nomination has been rejected by the Overseers. (Rep. p. 15.)

6. As to Salaries. That the action of the Corporation upon the subject of salaries of College officers or servants is subject to approval or rejection by the Overseers as matter of confirmation or revision; so that no establishment of a salary can become of legal validity until thus confirmed, or can continue so if disapproved of by them. And this, the Committee say, may be regarded as a matter free from all doubt. (Rep. pp. 15, 16, 17.)

7. As to the Salary of the Treasurer. That the present salary of the Treasurer is an unsuitable one; and that, the vote establishing it not having been confirmed by the Overseers, it is not lawfully payable. And the Committee add the expression of *their surprise to learn*, that about November 27, 1852, the Corporation passed a vote directing a salary of fifteen hundred dollars to be paid to him. And fur-

ther, that "it is difficult to comprehend for what reason said order or vote was adopted." (Rep. pp. 23, 24, 25, 26.)

From this statement of the claims of the Overseers, as set forth in the Report, and presented by their Committee as the subjects of the proposed joint rules, it is apparent that, if these views are correct, they possess substantially the whole control of the College, and have its management and interests entirely in their hands and at their will; and that the President and Fellows are nothing more than mere trustees, to hold the legal title of its estates, with a power of nomination to its offices, and of suggesting measures for its government;—that they have no power to acquire, by purchase, bequest, or gift, the most trifling amount of real or personal property; to make any investment, or any contract relating to the use, management, or investment of any; to expend a farthing of its funds or income, or enter into any agreement involving such expenditure; to make a single appointment of any person to any office or service, however menial; or do any act in its government, unless the same be authorized by some precedent grant of authority from the Overseers, express or implied, or be ratified by their subsequent approbation.

And that such is not an exaggerated statement of the necessary legal consequences of these alleged rights, if actually existing, is not only clear from the manner in which they are stated in the Report, but also from the language of the Committee, who, at the close, take care expressly to represent the duties of the Corporation as confined to *business affairs*, and the discharge of functions of an *executive character*; the italicizing being their own, seemingly for the purpose of the more emphatic expression of this conclusion. (Rep. p. 26.)

If this be the truth, it is certainly of extreme importance that it should be known, not only for the information of the State, which has a very profound interest in the College, as an institution to which it is greatly indebted for its intellectual advancement and its high position, but also, and

still more, for the information of those who may hereafter incline to endow the College, and those who may be invited to accept a trust presenting no inducements of public honor or emolument, requiring great, and oftentimes most inconvenient, expenditures of time and labor, attended not infrequently with painful and embarrassing perplexities, — a trust, moreover, exposing those who undertake it to injurious imputations and reproaches in public and in private, without having an opportunity of defence, and which no devotion to its service, however disinterested and earnest, and no prosperity of the institution, however manifest or unexampled, can prevent or modify, — placing them in agitating conflicts with those in high places for the preservation of its legal immunities, and leaving them wholly without other reward than the consciousness of duty faithfully attempted, though in efforts wholly unappreciated, and the gratifying evidence of the prosperity of the subject of their charge.

If to these considerations are to be added those of being held as the mere bailiffs of estates, substantially belonging to the Overseers, which can neither be acquired nor disposed of without their consent, and being accounted only as their servants in the administration of the "*business affairs*" of the College, with no power to act in any matter but at their bidding or by their permission, the inducements to assume the trust may be hereafter perhaps considered of less account than they hitherto have been, excepting to those who may anticipate personal advancement to themselves or their friends in taking upon themselves the office.

In thus exhibiting the true nature and consequences of the rights claimed by the Overseers, if susceptible of establishment, your Committee have no design to imply or intimate that any disposition on their part exists, or is at present to be apprehended, for the assertion and enforcement of them in the extreme manner suggested, or injuriously to the interests of the College as they understand those interests. But they will not be guilty of the affectation of con-

cealing their belief, nor of unworthy timidity in withholding the expression of it, that the time, under less favorable circumstances, may arrive, when it might be hazardous to the best interests of the College, if not to the purposes of its foundation, to have this unlimited power placed in the hands of any public body, the most influential members of which are in great part appointed at political elections, or by those deriving authority under them. No American citizen needs to be informed of the lengths to which the most honest and seemingly sincere men may be urged by political excitements in this country; and no one would wish to place within possible reach of their vortex any institution of public education and charity, if any alternative could be found. Under these circumstances, it becomes the imperative duty of this Board not to acquiesce in the claims thus made by the Board of Overseers, unless they can be maintained upon strictly legal foundations; while at the same time it is no less its duty frankly and cheerfully to acquiesce in all which may be found to be thus established. The Committee proceed, therefore, to lay before the Board the result of their investigations.

The two sources of information, by recourse to which these questions must be settled, are the Legislative Acts establishing the two Boards, and the history of the proceedings of the two Boards under those Acts.

An interesting and perhaps somewhat difficult question may exist as to the existence of any visitatorial power over the College existing in the State, beyond that which it has over all eleemosynary institutions, to secure the faithful administration of their funds and estates, for the purposes of their creation, through the instrumentality of its legal officers and judicial tribunals. But it is quite manifest that as this power, wherever existing, arises wholly from the grant of the property to be administered, and pertains only to the founder, or those to whom he has delegated it; and as the Overseers can in no sense be accounted the found-

ers of the College, and therefore, if they have any visitatorial powers, can have none beyond those delegated by the legislative acts relating to them and the charter of the College, the inquiry concerning the existence of the rights claimed must be confined to these acts and charters in the first instance, and the subsequent history of the College, as confirmatory or explanatory of them.

It is plain, however, that such history can only be available as an aid in the construction of the acts and charters in matters where they are equivocal or silent; and that no practice or mode of procedure, of however long continuance, can be of any avail to control or alter the express or plain provisions of the charter, or to operate as an abandonment of any right clearly vested by it. This point is fully conceded, or rather very emphatically asserted, by the Committee in their Report (p. 17), and is undoubtedly a sound canon of construction.

But although these legislative enactments are the only sources of the "relative powers, duties, and responsibilities of the Corporation and Overseers of Harvard College," which the Report under consideration purports to exhibit and establish, that document contains no allusion to the particular provisions of the act establishing the Board of Overseers, nor any reference to its contents other than the general remark, that "in the year 1642 the first Act was passed creating a government over this Seminary at Cambridge," and the setting forth the description of persons who were to compose the Board.* But it seems difficult to account for some of the positions taken in the Report, otherwise than upon the assumption that the Committee considered that Act a grant of the entire government of the College, both legislative and executive, and as vesting universal power and authority over it, which is still existing, excepting as modified by the charter. It is manifest, however, that this Act gave to them only certain limited powers

* See Appendix, No. I.

precisely specified ; and that the nature of them, and the omission of all others, are elements material to be considered in attempts to ascertain with accuracy the "relative powers, duties, and responsibilities" of the two Boards.

The powers thus vested in them were those of making and establishing orders, statutes, and constitutions for the instituting, guiding, and furthering of the College and its members in piety, morality, and learning, provided that upon complaint they should repeal the same, if found injurious to the College or any member thereof, or to the public weal, *or stand accountable thereof to the next General Court* ; and of dispensing, ordering, and managing to their use all gifts, legacies, bequeaths, revenues, lands, and donations. And these are all that were thus given to them. They were not empowered to make any appointment of the President or of any other officers, nor to receive or acquire, by purchase or gift, any estates, real or personal, with or without condition ; nor to execute any orders or laws ; nor to administer or interfere with the discipline or instruction of the College, excepting by the precedent establishment of orders, statutes, and constitutions for that purpose.

The power of appointing to office remained in the Legislature, as also that of acquiring or receiving estates for its use, as is virtually conceded in the Report (p. 5) ; and the execution of the laws and course of discipline and instruction were in the hands of the officers, subject only to legislative control.

If any doubt could be raised of the soundness of this construction, by reason of the use of the word "orders," as susceptible of an interpretation embracing appointments to office, and especial directions in particular cases, and acts of discipline, or of other interference in the management of College affairs, a moment's examination would dispel it. The connection in which this word is used with "statutes and constitutions," in the first instance, and the subsequent provision for the repeal of such orders, and the extravagant latitude of construction requisite for embracing appoint-

ments to office and acquisitions of estates in such use of the term in such connection, and the subsequent employment of it in the Charter of 1650, where it is used as identically synonymous with rules, or by-laws, and is believed to admit of no other construction, and the like use in the Appendix, must, it is believed, entirely dispose of any such question. The Overseers, therefore, by virtue of the act creating that Board, had only the power of enacting laws for the government of the College, and of administering its finances. They had no power of appointment to office; no right to receive, acquire, or hold any estates, real or personal; no right to execute laws, or administer discipline; were not trustees, even, in any true sense of the term; and were under no legal responsibilities for the use of property given for the College, the legal title to which remained in the Colonial government, and whose only power to prevent abuses in the administration of it was by withdrawing possession from them, or by discontinuing the Board. They were, therefore, merely *quasi* governors, appointed by the Colonial government over a College which, with all its estates, belonged exclusively to the Colony.

By the Charter of 1650* the exercise of all these powers was vested primarily in the Corporation; and to that extent the grant of them to the Overseers was repealed and annulled; and they therefore retained or acquired only such as those enactments reserved, or vested in them.

As the argument in behalf of the claims made by the Overseers seems founded wholly upon the provision of this Charter, and of the enactment in 1657 called the Appendix,† a preliminary exposition of these Acts, and of what is believed to be the true meaning of their terms and provisions, will aid in the inquiry, how far they tend to sustain or disprove the validity of the claims under consideration. And this is deemed the more material, as it is feared that the mode of citation and reference, and of juxtaposition, adopt-

* Appendix, No. II.

† Appendix, No. III.

ed by the Committee of the Overseers, may lead to misapprehensions, which it is impossible to suppose could have been intended or foreseen.

In this exposition the copies as printed in President Quincy's History of the College are adopted. And the divisions made by periods in the Charter will be denominated Clauses, for convenience of numbering and reference, and because of the obvious propriety of their being considered as thus distinctively and separately distinguished from others in the context, where that consideration becomes of any importance.

The Charter of 1650 commences with a preamble, merely setting forth the fact that the College had become the recipient of estates and gifts bestowed for its benefit, and that the minds of many were stirred up to like benevolence; thus impliedly presenting the necessity of an incorporated body for their reception and management, for the purposes of the institution.

The first clause incorporates several persons, therein named, to be a Corporation by the name of the President and Fellows of Harvard College, specifying their respective offices, to constitute the first Board; with a provision for the election by themselves of their successors, by the presence and consent of the Overseers, in perpetual succession; giving to the Corporation thus formed power "to purchase and acquire unto themselves, or take and receive upon free gift and donation, any lands, tenements, or hereditaments within the jurisdiction of Massachusetts, not exceeding five hundred pounds per annum, and any goods and sums of money whatsoever, to the use and behoof of the said President, Fellows, and scholars of said College, and to sue and plead or be sued and impleaded by the name aforesaid, in all courts of judicature within that jurisdiction."

The second clause gives to the President and any three of the Fellows power to appoint a seal for the Corporation.

The third authorizes "the President and Fellows, or

major part of them, from time to time to meet and choose such officers and servants for the College, and make such allowance to them, and them also to remove, and after death or removal to choose such others, and to make from time to time such orders and by-laws for the better ordering and carrying on of the work of the College, as they shall think fit: provided the said orders be allowed by the Overseers."

The fourth provides "that the President and Fellows, or major part of them, with the Treasurer, shall have power to make conclusive bargains for lands and tenements, to be purchased by the said Corporation for valuable considerations."

The fifth is in these words: "And for the better ordering of the government of the said College and Corporation, be it enacted, by the authority aforesaid, that the President and three more of the Fellows shall and may from time to time, upon due warning or notice given by the President to the rest, hold a meeting for the debating and concluding of affairs concerning the profits and revenues of any lands, and disposing of their goods (provided that all the said disposings be according to the will of the donors); and for direction in all emergent occasions; execution of all orders and by-laws; and for the procuring of a general meeting of all the Overseers and Society in great and difficult cases; and in case of non-agreement; in all which cases aforesaid, the conclusion shall be made by the major part, the said President having a casting voice, the Overseers consenting thereunto;— and that all the aforesaid transactions shall tend to and for the use and behoof of the President and Fellows, scholars, and officers of the said College," &c.

The sixth provides that all estates of the College, not exceeding the value of five hundred pounds per annum, should be exempted from taxation.

And the seventh, that the President, Fellows, and scholars, together with the servants and other necessary officers to the said President or College appertaining, not exceed-

ten, to wit, three to the President and seven to the College belonging, shall be exempted from civil office and military exercises; and such of their estates not exceeding one hundred pounds a man shall be exempted from all taxes and rates.

From this full summary of the contents of the Charter, in its own language, it is obviously divisible into three distinct parts or sections:—

The *first*, consisting of the first four clauses, containing the incorporation, and a statement of its object, and vesting in the Board thus created certain carefully defined powers necessary for their accomplishment.

The *second*, consisting of the fifth clause, regulating its mode of action in the exercise of those powers, and enabling it to avail itself of the counsel and aid of the Overseers when desired.

And the *third*, embracing the sixth and seventh, providing for the exemption of the estates of the College from taxation, and of members of the Corporation and certain officers of the College from civil and military service, and their estates, to a certain extent, also from taxation.

The powers granted to the Corporation, — of acquiring by gift or purchase, and of holding, real and personal estates not exceeding in value the amount prescribed; to institute and defend suits; to appoint a seal; to appoint officers and servants; to appoint their salaries or allowances; to remove them and appoint others in their stead; to make bargains for lands and tenements for the use of the College; to conclude affairs concerning the profits and revenues of its estates, real and personal; to provide for all unexpected emergencies; to execute all orders and by-laws; and to call meetings of the Board of Overseers when it should think proper, in great and difficult cases and cases of non-agreement, — were unlimited, and without any right of interference or control on the part of the Overseers; and with no accountability to them; and no responsibility to any other person, or body, excepting that existing by law be-

tween all eleemosynary corporations and the government creating them, by which the latter has the unquestionable right of supervision and interference, by the agency of its judicial tribunals, to see to and enforce the faithful administration of the trusts for which they are established.

While to the Board of Overseers were reserved the highly important and responsible powers of negating the election of officers and members of the Corporation; of dissenting to and rendering invalid any orders and by-laws enacted by the Corporation for the better ordering and carrying on of the work of the College; and of finally deciding upon all great and difficult cases, and cases of non-agreement, when called upon by the Corporation for aid and counsel.

As above shown, the Overseers, by the act creating their Board, had no other powers than those of enacting orders and by-laws, and administering the finances of the College; both of which were expressly conferred upon the Corporation, and therefore by necessity taken from them; they could make no pretence to any general visitatorial power or control, and clearly none such was given by this charter.

Such your Committee believe to be the true construction of this instrument, which, although seemingly somewhat obscure upon first perusal, on a careful examination presents, as they think, no serious difficulties of interpretation. Such, they would have said, is its clear and unquestionable legal meaning, were it not for the highly respectable authority by which this seems to be denied, and by which a contrary doctrine is attempted to be established, the grounds of which your Committee now proceed respectfully to examine. In doing so, however, they are somewhat embarrassed by inability to understand, from the Report to the Overseers, the precise clauses or provisions of the charter upon which it is intended to base the claims under consideration, excepting those of control over appointments and salaries, which seem to be rested entirely upon the third clause above cited (pp. 17, 18). And as this and the

fifth clause are those alone upon which any such pretensions can, as your Committee understand, be founded, it may be well to endeavor to ascertain their true construction before advancing to the consideration of the doctrine which they are relied upon to support.

The very precise language of the third clause, constituting in itself a period, and intervening between two other periods, each vesting in the Corporation an important and wholly independent power, in neither of which is any such right of control given to the Overseers, seems to your Committee to admit but of one rational and consistent construction,—so far as the consent of the Overseers may be supposed to be essential to the validity of any corporate act. This construction is, that such consent is thereby made essential only to the provision contained in that clause; and cannot be, by any reasonable interpretation, extended back so as to embrace acquisitions of estates, real or personal, by gift or purchase, or the power of instituting or defending suits, or the appointment of a seal; nor be extended forward to comprehend bargains for lands and tenements; or be in any wise made to reach to the administration of the College finances. Nor is there anything in the Report to the Overseers indicating that any such idea was entertained by their Committee.

Assuming, then, that the application of the words “provided the said orders be allowed by the Overseers,” is to be confined to the third clause, the only inquiry is, what is meant by the word “orders”;—whether it is to be taken as embracing appointments and removals of officers and servants, and the making of allowances to them, as well as orders and by-laws for the better ordering and carrying on of the work of the College, or is to be confined to such orders and by-laws.

And your Committee find it difficult to believe that a doubt could arise, if the construction of the Charter were now for the first time presented for consideration, unembarrassed by any preconceived opinions or prejudices, or

any acts of the two Boards which may be supposed to call for the extending of the application of that word to all the previous subjects of this clause. It seems to them to be as clear as language can make it, that the word "orders" in the proviso has the same meaning that it has in the preceding portion of this clause. It surely cannot be pretended, that, when first employed, it means appointments to office or removals from it, or the establishment of salaries and allowances. It was certainly then used to express some other, further, and different act. And by what rule of construction can it be forced in the proviso to embrace important subjects not then included? But if doubt could otherwise rest upon it, all such must be removed when it is observed that the orders spoken of in the proviso are expressly declared to be the same as those previously mentioned; they are particularly described as "*the said orders.*"

It is clearly thus used as synonymous with rules or statutes, as is constantly done in common parlance; and is not wholly expletive, as it may embrace statutes and rules, as well as by-laws technically so called, which might not otherwise be considered as included. And that such was the use intended is further most manifest, because if it were not, then it must have been used as descriptive of something else, and then no authority is given to the Overseers to disallow by-laws, for they are not in terms included in this proviso; either, therefore, they must be embraced in this word "orders," or the Overseers have no authority over them.

A further proof from the context of the Charter, if further could be desirable, is found in the fifth clause, whereby the President and Fellows are authorized to hold meetings "for the execution of all orders and by-laws" (p. 18). *These must of course be the same orders and by-laws mentioned in the third clause,* for the President and Fellows could have no right to execute any others; and how are they to meet for the execution of orders and by-laws which

had never been passed, and had no existence? or by what force of construction could the appointment and removal of officers and allowance of salaries be denominated *executions of orders and by-laws*?

Your Committee forbear further comment, excepting an allusion to the incredibility, that, if it were intended to submit to the control of the Overseers subjects so important as that of the appointment of officers and the allowance of salaries, to the extent in which the Committee of the Overseers understand the power given in this clause, it should have been left to such doubtful interpretation by the use of the word "orders" only in the proviso,—so entirely inapt to convey any clear or certain allusion to them, when the employment of direct and fitting terms would have been so natural and easy, not to say so unavoidable.

Believing it therefore clear, that the third clause gives to the Overseers no other power than that of affirming or disaffirming the orders and by-laws enacted by the Corporation, that is, all rules, statutes, and regulations, as indeed the word "orders" in its strict sense denotes,—including a wider range than the term "by-laws," which, however, it also embraces,—your Committee proceed to ascertain the true construction of the fifth clause.

In the consideration of this clause, the question is, to what cases the words, "in all which cases aforesaid, the conclusion shall be made by the major part, the said President having a casting voice, the Overseers consenting thereto," were intended to apply;—whether to all cases of exercise of the powers previously given to the Corporation, or to all those enumerated in this fifth clause, or to the great and difficult cases, and cases of non-agreement, stated in the immediately preceding sentences.

This clause, as has been suggested, is believed to have been intended only to *regulate the mode of action* of the Corporation in the exercise of the powers previously granted, and to enable it to avail itself of the counsel and aid of the Board of Overseers in the administering of affairs of

magnitude and difficulty, rendering such counsel and aid desirable.

There can be no doubt that all the powers ever exercised or claimed by the Corporation, excepting that of calling meetings of the Overseers for that purpose, were fully and effectively conferred upon it by the previous provisions of the Charter without the aid of this fifth clause. The power to receive estates by gift or purchase, "to the use and behoof of the President and Fellows of said College," legally and necessarily implies the power to manage such estates, to make investments, and to appropriate the income and revenues accruing therefrom to their benefit. The power to enact orders and by-laws necessarily and legally implies that of executing them, when, as in this case, the legislative and executive powers are vested in the same persons. The power of direction in all emergent occasions is necessarily and essentially incident by law to all persons and corporations, as an elementary right of self-preservation. Also the manner of calling meetings of the Board, and the giving of peculiar authority to the vote of the President, might have been left as proper subjects for orders or by-laws, and required no new gift of power for these purposes. But it was reasonable, and in ancient charters usual, for the Legislature to prescribe the mode of calling meetings; and fitting thus to secure the preponderance of the President's voice in debatable matters. Moreover, no order or by-law could have been enacted giving to the Corporation the right to call a meeting of the Overseers for the purpose of obtaining their counsel and advice. This additional power was therefore here granted; but it is to be observed, that it is one solely for the purpose of enabling the Corporation to obtain aid in exercise of the powers previously granted, and not of vesting in them any new authority, to be primarily exercised for any other object.

It is then to the first four clauses that we are to look for definitions of the powers granted, and the limitations intended to be imposed upon them. And in so doing we

find all of them accurately defined, and an express limitation carefully impressed upon two of them; namely, that of electing officers and members of the Board, and that of enacting orders and by-laws,—each being made expressly and individually subject for the validity of its exercise to the consent of the Board of Overseers. And it is certainly very remarkable, that, if the like limitation were intended to be imposed upon the exercise of all, or of any, of the other powers granted, it should not have been thus distinctly prescribed; and that, while these two were thus conspicuously distinguished from the rest by this limitation attached to each separately, the rest were left to the uncertain inferential application of another remote provision in a subsequent clause, clearly intended for purposes very different from that of definitions of the powers granted.

Again, in order to make these words, “the Overseers consenting thereunto,” in the fifth clause, applicable to the acquisition of estates by donation and purchase, to investments, and financial operations other than those concerning income and revenues, and to appointments, it is necessary to carry back their operation, not only to all the acts mentioned in this clause, consisting of a distinct paragraph and period for purposes obviously peculiar to itself, but to all the provisions in the preceding clauses, including those to which the same limitation was severally and specifically attached; for none of these subjects can be pretended to be embraced in the fifth clause. And by the same reasoning, they must relate to the right of appointing a seal, and of suing and defending suits,—so that neither of those acts could be done without the previous consent of the Overseers, or be valid without their subsequent ratification;—a violence of construction which your Committee believe would be equally unparalleled in legal experience and rational criticism. Can it be for a moment seriously argued, that the Corporation, the sole legal owner of all the estates of the College and administrator of its revenues, cannot institute or defend a suit for their recovery

or protection, without the consent or approbation of the Overseers? or that the latter may abate such prosecution or defence, or compel its abandonment, at their pleasure? But this consequence would as inevitably follow from this construction, as would that of controlling the right of the Corporation to accept donations, to negotiate purchases or sales, to make investments other than of income, or to make appointments to offices of instruction or government.

But your Committee forbear to dwell longer upon such a question, not only because they cannot persuade themselves that it merits further discussion, but because they believe that, upon a careful consideration of this fifth clause, it is clear, beyond reasonable doubt, that the words "the Overseers consenting thereto," as used in it, have no retrospective operation beyond the provisions immediately preceding them, — for the decision of great and difficult cases, and cases of non-agreement of the Corporators, — when the Overseers may be called upon to aid in and finally determine such decision. All the other powers vested in the Corporation, or necessary for the administration of College affairs, had been given, as above shown, in the preceding clauses; and those to the effective exercise of which the consent of the Overseers was intended to be made necessary, were each distinctly and expressly made subject to it; and these words were here introduced for the sole purpose of defining the manner in which great and difficult cases, or cases of non-agreement, arising in the deliberations of the Corporation, should be decided upon appeal to the Overseers; their consent being thus made essential to the conclusion to which it was to relate, so that such conclusion would be of no validity without it.

That these words could not have been intended to have any further operation, is manifest from the nature of the preceding provisions in the first four clauses, and still more strikingly so from those preceding in this fifth clause. It would be practically absurd to make the legal validity of

every contract in the management of real estate, for hiring, leasing, repairing, insuring, and improving the same; of the expenditure, appropriation, or investment of every dollar of personal estate, and of the profit and revenues of lands and tenements; of the appropriation of all donations of personal estate; and of every contract with every officer, artificer, menial, servant, and laborer, involving the expenditure of a dime, — dependent upon the previous consent or subsequent approbation of the Overseers. It would be obviously impossible to make the binding force of all directions given by the Corporation in difficult and sudden emergencies, or, as they are denominated in the Charter, “emergent occasions,” dependent upon such consent, which might not, and probably could not, be obtainable until long after the occasion had passed. It would be equally absurd, if not more so, to make the execution of the orders and by-laws, which had been already previously established by the approbation of the Overseers, dependent for its propriety and legal effect upon their subsequent consent; and especially when, as must often happen, the instant and effective and final execution of them would be demanded by their nature and objects, in order to protect the College from the ruinous consequences of lawless violence or misconduct. It would be, if possible, still more absurd, and certainly not less impracticable and inconsistent, to make the consent of the Board of Overseers necessary to *give validity to a call made upon them by the Corporation* to hold a meeting for aid and counsel in great and difficult cases, and cases of non-agreement, to which aid and counsel they are by this clause entitled.

But all these absurdities and unreasonable consequences, with the others above alluded to, must follow, if the words “the Overseers consenting thereto,” in this fifth clause, are to be construed as extending farther back than to the provisions immediately preceding them, relating to “great and difficult cases, or cases of non-agreement,” and as applying to its previous provisions. Whereas, if confined to

them, there is not only no absurdity, impracticability, or inconsistency involved, but the interpretation of the whole clause becomes simple, intelligible, and consistent with the most rigid rules of critical analysis and construction. And the circumstance that the Corporation is thus clothed with especial authority, in this formal manner, to call meetings of the Overseers to settle great and difficult cases, and cases of non-agreement, is of itself evidence that it was in such cases only that their decision was to be held necessary. Why give this particular power in these specified cases, if it was intended that the Overseers should be called upon to authorize or ratify, in all cases relating to the same subject, the proceedings of the Corporation?

Your Committee therefore respectfully but confidently submit, that, upon the legal construction of the Charter of 1650, the only acts of the Corporation to which the assent of the Board of Overseers was made essential, in order to give them permanent validity, were those of the election of officers and members of the Corporation; of enacting orders and by-laws,—which they understand to embrace all rules, statutes, and organic laws affecting the College government, or any department of it; and of deciding all great and difficult cases and cases of non-agreement presented for their decision at meetings of their Board called by the Corporation for that purpose.

It remains to consider what changes were made in these powers of the Overseers by the subsequent enactment of 1657, styled the Appendix.

1. That statute provides “that the Corporation shall have power from time to time to make such orders and by-laws, for the better ordering and carrying on of the work of the College, as they shall see cause, without dependence upon the consent of the Overseers *foregoing*: provided, always, that the Corporation shall be responsible unto, and those orders and by-laws shall be alterable by, the Overseers, according to their discretion.”

2. And “that, when the Corporation shall hold a meet-

ing for agreeing with College servants, for making of orders and by-laws, for debating affairs concerning the profits and revenues of any lands or gifts, and the disposing thereof (provided that all the said disposals be according to the will of the donors), for managing of all emergent occasions, for the procuring of a general meeting of the Overseers and Society in great and difficult cases, and cases of non-agreement, and for all other College affairs to them pertaining, in all these cases the conclusion shall be valid, being made by the major part of the Corporation, the President having a casting vote. Provided always, that in these things also they be responsible to the Overseers as aforesaid."

3. It prescribes the mode of calling meetings of the Board.

Your Committee concur in the opinion expressed by the Committee of the Overseers (Rep. p. 16), "that the main, indeed almost the only object of the said Appendix, was to enable the Corporation to adopt votes and orders, which would become valid without the (previous) confirmation thereof by the Overseers." By the Charter, no order or by-law, or decision of a difficult case or case of non-agreement, calling for the advisory aid of the Overseers, could be valid, or of legal obligation, until their consent should have been given. It was plainly the purpose of this enactment to obviate those difficulties; and although the general language employed, declaring the Corporation to be responsible to the Overseers, might alone, or in other connections, be held to have a broader meaning, and to extend their authority so as to embrace a general visitatorial power, the limitations implied by the context conferring that responsibility, and the reasons before given in discussing the fifth section of the Charter, are entirely satisfactory to your Committee, that no intention existed by this act to enlarge the powers of the Overseers. They are confirmed in this view by the consideration that it is never mentioned, as they believe, in any subsequent record of the doings of either Board, nor in any of the legislative enactments concerning the College, excepting in one instance of a refer-

ence to it by the Corporation, in a vote of July 20, 1722, relating to an order or by-law, and in one by the Overseers in December, 1778, relating to appointments.

It is not referred to in the charters subsequently proposed where that of 1650 is recited, nor in the act of 1707, declaring the original Charter to be still valid, and not to have been repealed or annulled, as it certainly would have been if considered as containing a grant of essential powers not conferred by that Charter. Nor are the important subjects of appointments, acceptance of donations, and purchases of real and personal estate, or investments other than of income and profits, enumerated, as they certainly would have been if any increase of power was intended to be thereby given concerning them. It is indeed nowhere specifically relied upon by the Committee of the Overseers as a source of any new powers, or of the extension of former ones, but only as exchanging the right of confirmation for that of revision. (Rep. pp. 8, 16.)

In recurring to the second source of inquiry,—the History of the College,—it will be found far less satisfactory upon some of the matters under consideration than perhaps might have been anticipated; and is for several reasons less instructive than might be desired.

The entire dependence of the College upon annual grants of the Legislature for the support of the President, and, at times, of other of its officers, for a century and a quarter; the great personal influence of the members of the Board of Overseers during the Colonial and Provincial periods, composed as it was of the ruling magistrates and the clergy, whose authority in secular as well as in religious matters was little short of supreme; and the circumstance that the Charter was supposed to have been repealed with the Colonial Charter in 1684, and that the College was considered to be without one, and was under the management and control of the executive government from that time until the confirmation of the original one in 1707;

and the circumstance that donations were made to the Overseers, or subject to their disposal, — may well account for many otherwise seeming and unaccountable usurpations of power by the Legislature and the Overseers. In truth, there is scarcely any irregularity or unauthorized interference in College affairs by the Legislature or Overseers, for which a precedent may not be found in its history. This history is therefore to be studied and applied with peculiar care and discrimination, when adduced as authority for the exercise of power.

Again, it is evident that, while, on the one hand, proof of the exercise of authority claimed by the Overseers, and acquiesced in as such by the Corporation, has a strong tendency to prove its legitimacy, on the other hand, the fact that no reference has ever been made by the Corporation to the Overseers of any particular subject over which authority is now claimed, and that they have never required such reference, nor complained of its omission, is still more convincing proof that no such authority exists, especially if that subject be one of constant action by the Corporation.

The mere fact of occasional reference of questions or votes by the Corporation to the Overseers, and their consequent action upon them, has very little if any tendency to prove authority of the one to control the other in regard to the subjects of them. By the Charter, the Corporation is entitled to the advice and aid of the Overseers when called for, and is the sole judge when the right so to call exists; it is also natural and reasonable that the former, being a Board so small and comparatively humble, should desire the concurrence and countenance of the other in matters affecting the general conduct and popularity of the institution. Many votes and acts, therefore, may be, and always have been, and probably always will be, submitted to the Overseers by the Corporation for concurrence, or aid and counsel, — and in the determination of which the Corporation would acquiesce, though contrary to its own opinion, — and yet afford no just ground for the Overseers to

claim authority in any such, where their counsel and action were not invoked.

With these views of the College Charters and history, your Committee now proceed to the examination of the particular claims in question.

FINANCES.

The first of them, as stated in the Report of the Committee of the Overseers, relates to the finances, over the administration of which by the Corporation they claim unlimited right of supervision and control, as above shown (pp. 8, 9). It is expressly conceded in that Report (p. 9), "that a detailed statement of the condition of the College funds, and of all receipts and expenditures, is made annually by the Treasurer to the government of the University, which is examined by a committee of the Corporation and Overseers, whose certificate or report is presented to the Overseers at their annual meeting." And it might have been added, that this report is accompanied by, or annexed to, the detailed statement, and all are printed and annually distributed among the Overseers, so that every member of that Board has put into his hands, year after year, precise information of all details concerning the administration of the estates and funds of the College, and thus has every opportunity for knowing whether there has been any, the slightest neglect or violation of duty on the part of the Treasurer or Corporation. Moreover, the history of the College finances proves that the system pursued by the Corporation has thus far been found unsurpassed, if not unequalled, so far as the fidelity with which its estates and funds have been managed is involved.

No misconduct, irregularity, or mistake, requiring the application of any new set of rules, is pointed out or suggested in the Report. The Committee (Rep. pp. 9, 10)

admit that "it has not been the practice of the Corporation to make any separate communication to the Overseers of their doings in relation to the finances"; which shows that the whole history of the College is against the practical assertion by the Overseers, or acknowledgment by the Corporation, of any such right. And no particular clause in the Charter is cited or referred to in this connection with especial application to this claim. Your Committee therefore are equally at a loss to understand its foundation, or the motive for desiring any further rules upon the subject, or any agitation of it at this time.

Three fragmentary citations from the Charter are made, as the sources on which the various claims of the Overseers are understood to be founded. The first, touching the power of the Corporation "to purchase or otherwise acquire real estate or personal property, and to hold the same for the use and behoof of the President, Fellows, scholars, and officers of said College." The second, relating to choice of officers and servants, and allowance of their salaries, and the making of orders and by-laws. And the third, concerning the profits and revenues of lands and disposing of goods. (Rep. pp. 5, 6.)

The first has in itself plainly no tendency to support this claim; on the contrary, the power to acquire and hold real and personal estate would naturally imply that of erecting halls and chapels, &c., and making investments, and keeping the estates in repair and insured.

The second is thus stated: "It is also enacted in said Charter, that the said Corporation, or the major part of them, may meet and choose such officers and servants for the College, and make such allowance to them, and them also to remove, and after death or removal to choose such others, and to make from time to time such orders and by-laws for the better ordering and carrying on the work of the College, as they shall think fit: *provided the said orders be allowed by the Overseers.*" The italicizing is by the Committee.

This citation surely can have no tendency to support the claim under consideration, unless the words in italics be carried back so as to relate, not only to the provision in the citation first made concerning acquisitions of estates, &c., but also to other provisions intervening, — a construction which, for the reasons above stated (pp. 15–23) and the context, it seems impossible reasonably to contend for.

The third is quoted in these words: “And it is further provided by said Act, that the President and three or more of the Fellows may hold a meeting for the debating and concluding of affairs concerning the profits and revenues of any lands, and disposing of their goods, &c.; in all which cases aforesaid the conclusion shall be made by the major part, the said President having a casting vote, *the Overseers consenting thereunto.*” This italicizing is also by the Committee. (Rep. pp. 5, 6.)

This, therefore, it is presumed, must be the citation relied upon by the Committee as vesting in the Overseers the authority claimed over the finances of the College.

And if the words, “in all which cases aforesaid the conclusion shall be made by the major part, *the Overseers consenting thereunto,*” did in fact follow, in the Charter, in immediate sequence upon the words, “for the debating and concluding of affairs concerning the profits and revenues of any lands, and disposing of their goods,” (as this citation indicates, and would naturally lead one to infer,) without any intervening sentences to which they might apply, and which might satisfactorily answer to and explain them without supposing them to relate at all to “profits and revenues of lands and disposing of goods,” the inference would certainly appear reasonable, if not entirely satisfactory, that it was intended thus to vest in the Overseers supervisory control over the financial affairs of the College; and to make their consent essential to the validity of all expenditures of income from real estate, and all investments made by the Corporation.

But unfortunately for any such argument or inference,

this third citation is of *detached and widely separated portions only of the clause* in the Charter from which they are taken, as may be seen by reference to the whole context copied above (p. 18), composing the fifth clause; and there *are intervening sentences between these portions upon other subjects entirely foreign to "profits and revenues of lands and disposing of goods,"—to some of which, immediately following those words,* it is impossible to suppose that the other words, "the Overseers consenting thereunto," could have been intended to apply; *and other sentences upon other subjects, at the close and immediately preceding those last named,* to which it is not only reasonable, and perfectly consistent with the whole context, that they should be applied, but to which, for the reasons above stated (pp. 23–28), in the endeavor to ascertain the true construction of the Charter, it is believed to be morally certain that they were *intended solely to apply*. No reliance, therefore, as your Committee believe, can justly be placed on this fifth clause in support of the claims now under consideration.

Among the principal "financial operations" alluded to by the Committee in their Report (p. 10) as those over which they claim that the Overseers should have this control, are "those of erecting a new College hall or chapel." But it seems to your Committee, that they entirely omit any allusion to the clause in the Charter whence the power of the Corporation in these matters is plainly to be derived; although it immediately follows their second citation, and is contained in the same paragraph with it.

It is in these words: "And also that *the President and Fellows, or major part of them, with the Treasurer,* shall have power to make *conclusive bargains for lands and tenements,* to be purchased by the said Corporation for valuable consideration." This certainly must include the power to erect or build tenements, or halls and chapels, as identical with or necessary to their full beneficial exercise. It surely will not be seriously questioned whether a power to pur-

chase lands and tenements includes that of erecting buildings on land purchased for that use. And if the framers of the Charter intended to make the exercise of these powers dependent for its validity upon the prior consent of the Overseers, or their subsequent ratification, it is certainly most remarkable that they should have placed this clause immediately after that relating to the enactment by the Corporation of orders and by-laws, to the validity of which such consent is expressly made essential, and attach no such provision to this,—both, too, being in the same paragraph. It is believed that no clearer case of construction can be presented or imagined, by which an intention to vest this power in the Corporation, without any such limitation, could be made manifest.

The views above taken of the Appendix render further comment upon it in this connection needless. But it is strikingly observable, that no allusion whatever is made in it to this most essential power of purchasing or otherwise acquiring real estates, in the enumeration of those mentioned in it. There is not to be found in the Charter or Appendix a word upon the subject of sales of lands, and this omission appears subsequently to have created doubts of the power of the Corporation to make any. No argument therefore can be deduced from either of these enactments in support of the claim, now sought to be established by the Overseers, of right of control over them.

Your Committee therefore confidently submit, that neither the Charter nor the Appendix affords any reasonable ground for the claim made by the Overseers to control the administration of the College finances.

In adverting to its history upon this subject, we start with the admission by the Committee in their Report (pp. 9, 10), that “it has not been the practice of the Corporation to make any separate communication to the Overseers of their doings in relation to the finances,”—the annual report by the Treasurer of receipts and expenditures being all that has been submitted to them. But the Committee

now claim, that, when important expenditures *are in contemplation*, the subject should be submitted to the Overseers for their approval or rejection; thus introducing an entirely new subject of communication with that Board. No line of demarcation is suggested, by which it can be determined what operations should be deemed unusual, or of sufficient importance to be thus submitted to the control of the Overseers, — nor any means of avoiding differences of opinion upon that subject; but as this power of the Overseers, if they have any, extends from the payment of the day's work of a laborer, up to that of the cost of a hall or chapel, it is obvious that the latitude existing for such differences would probably lead to many difficulties in the practical application of any rules that could be framed. The history of the College is believed by your Committee to be conclusive against any such claim.

In regard to sales of lands, it appears that, up to the year 1783, it was supposed that the Corporation had no power to sell lands belonging to it, without a special act of the Legislature for that purpose; and accordingly applications were at several times made by the Corporation for such leave, sometimes with and sometimes without the concurrence of the Overseers. In 1754, the Overseers advised the Corporation to obtain from the Legislature general leave to sell, with the advice and consent of the Overseers, such lands as were or should be received upon mortgage, or taken in execution for debt; and such an act was procured. But it is obvious that this was merely a legislative investment of authority, that could not be extended beyond its precise object, as stated in the enactment; and it has no tendency to aid in an inquiry concerning the general powers of the Overseers, otherwise than as it is a very clear admission on their part that they possessed no power to make or authorize sales, as is also their subsequent vote next hereafter mentioned.

In modern times no such act would be considered of any importance, as it is perfectly well established that, by the

common law, a corporation with authority to acquire and hold lands has the power also to sell them, as necessarily incident to such tenure. In February, 1783, "the Overseers voted that the Corporation be desired to inquire whether they are at present empowered, with the consent of the Overseers, to alienate lands belonging to the College; and if they are not, to apply to the General Court for a law granting them that power." There is no evidence that the Corporation ever applied for such law, or that any such was ever enacted; it having probably been ascertained, upon legal investigation, that the Corporation possessed the power as inherent to it by the common law. About that time a special act was passed authorizing the Corporation to convey a township in Maine to one Peabody; but he, and not the Corporation, was the applicant for that act. From that period down to the year 1803 there were various sales of real estate, and in most cases, if not in all, the votes of the Corporation were referred to the Overseers,—being usually to sell, provided that the Overseers should approve or concur. Since that period it appears that the Corporation has exercised its clear legal right to make sales of lands in numerous cases, without seeking for the concurrence or approbation of the Overseers in any of them, including that of the Parkman Township in Maine; all which must have been known to the Overseers, the proceeds being set forth distinctly in the Treasurer's annual accounts.

With regard to investments, it appears that in 1730 the Overseers advised the Corporation to let out funds on bills of credit; and in 1736 they voted that "the College Treasurer should call in the College money let out on bonds, the value of which is not ascertained, and let out said money agreeably to the advice of the Board." There is no evidence known to your Committee that the Corporation had asked for advice upon this subject, or ever acted in accordance with that thus given. It is however too plain for argument, that no such vote, unless upon a matter submitted

by the Corporation, could be of any legal obligation upon it, or could be reasonably cited in support of authority so to control it.

With these exceptions, if they be such, your Committee are unable to find any instances in which the Overseers have ever sought or claimed the right to interfere with or control the investments of College funds. And when the great numbers of them, in the different departments, which have been continually made, are taken into consideration, with the circumstance that they are always made subjects of statement in the Treasurer's Reports, so that their existence is brought constantly to the notice of the Overseers, it certainly seems marvellous that no occasion has been found, or attempt made, for the exercise of a power of such vital importance, if existing.

With regard to purchases of lands, your Committee are unable to find any instance in which the consent or concurrence of the Overseers has been sought for or given, or in which the omission to apply for it has been the subject of any remonstrance or complaint, although many such purchases, and some of great importance and notoriety, have been made; as, for instance, the granite buildings in Brattle Street in Boston, and the lands adjacent to the Observatory.

All the College buildings which were erected after the enactment of the Charter, and prior to the year 1803, were built with funds obtained wholly or chiefly by grants from the State, which were usually obtained from the General Court, by the aid or with the countenance of the Overseers, whose influence in obtaining them was of course very great, if not essential. And no argument in favor of any power of control on their part in other cases can be framed on such concurrence or consent. But since the year 1803, Stoughton Hall, Holworthy Hall, Gore Hall, University Hall, and Dane Hall have been erected, and Harvard Hall altered at great expense, by the Corporation, without any reference to the concurrence or consent of the Overseers, and without

the slightest suggestion on their part that any such was necessary or should have been sought for. And, in fine, during the past half-century and more, not an instance can be found, as your Committee believe, in which the Corporation has ever sought for or had the consent or advice of the Overseers in any financial operation whatsoever.

So far, therefore, as history is to be relied upon in deciding the question of the validity of this claim, your Committee submit that it is impossible to imagine a stronger proof that it has no just foundation. They are, however, unwilling to leave the just results of their historical research upon these subjects here.

They submit, that these results are highly confirmatory of the construction which they have above given to the Charter and Appendix, in saying that the limitations contained in the terms, "*provided the said orders be allowed by the Overseers*" in the third clause, must be confined to rules, statutes, and by-laws, and cannot be extended back to relate to acquisitions of lands by purchase or otherwise, or the incidental power of selling them; and that the limitation in the words, "*the Overseers consenting thereunto*," in the fifth clause, must be confined to the immediately preceding sentences, relating to "great and difficult cases and cases of non-agreement," and cannot be carried back to refer to "concluding of affairs concerning profits and revenues of lands and disposing of goods," or to any anterior provisions in the Charter; and that the Appendix cannot be considered as enlarging the powers of the Overseers on these subjects. For if those provisions, or any other in the Charter or Appendix, vested in the Overseers the great powers of supervising and controlling all important investments of College funds, all purchases and sales of its real estate, and erections and alterations of all College buildings, — powers, the exercise of which underlies the very existence of the College, as a practical institution, which are of constant daily application, and necessarily involving the frequent expenditure of very large amounts of its re-

sources, — how is it possible to account for the entire omission of the Corporation to recognize some of them at any time, and every one of them for the past half-century, and for the like entire acquiescence of the Overseers in such omissions, when, if they had these powers, there could be no others which it was more imperatively their duty to exercise?

DONATIONS.

The next subject presented for consideration by the Report, and one of importance not less grave, is that of Donations, — the acceptance or rejection of which the Overseers claim to be subject to their control. This claim is of peculiar interest, inasmuch as the means of instituting new schools, and new foundations for instruction, or charitable aid to students, and of increasing the library and philosophical apparatus, and cabinets and other appliances for advancement in letters, science, and art, always have been, and probably ever must be, mainly dependent upon this source; the income of the College subject to general appropriation having been hitherto barely sufficient for its other necessary expenditures, and it being desirable to continue such exclusive application of it, in order to reduce as far as possible the cost of education within its walls. And it is to this source chiefly, in the munificence of private individuals, that the pre-eminence of this institution over all others in this country in its means of instruction is owing. It has attained to this pre-eminence certainly without any practical exercise of such power as the Overseers now claim; and under the generally prevailing belief, that the Corporation has the exclusive power of acquiring and administering its finances. And regarding the sensitiveness of public opinion upon monetary investment, and the great care with which benefactors of public institutions look to permanence in the safety and appropriation of their gifts, it is at least questionable

whether so great a change as is now proposed would be for the benefit of the College;— to say nothing of the unwillingness of many of those who may intend benefactions to have their motives and designs thus made matter of public debate, and exposed to what might seem to them or their heirs disparaging rejection. And that these are not merely fanciful apprehensions, your Committee are able to affirm from their own knowledge that, in two instances at least, intended donations by will, and one of them of a very large amount, have been already revoked in consequence of recent attempts in the Legislature to alter the Charter and reorganize the Corporation, and of the agitation of the questions now under discussion; and that these objections have been made by one of the most liberal living benefactors of the College in reference to future gifts. They feel, therefore, that no trust committed to their keeping is more solemn or sacred than that of firmly maintaining the powers which they believe to be vested in them by the constitution of the College for the care and administration of its estates.

Upon this subject the claim made in the Report is, that the Overseers may well have a right to expect that the Corporation will give them official notice of every simple bequest, or gift, unaccompanied with any qualification or condition; although, under ordinary circumstances, it might not be deemed matter of any great importance. But that when any donation is upon a particular condition, or is accompanied by a special trust, *the vote of acceptance by the Corporation is not sufficient and complete until concurred in by the Board of Overseers.* (Rep. p. 10.)

In this instance also the Committee make no reference to any particular clause or provision upon which this right is claimed, but leave it to rest without designation upon some one or more of the fragmentary citations from the Charter or Appendix made in their Report, or upon some principle of which your Committee is uninformed. The only provision in the Charter which they can imagine to

be supposed to have any bearing upon the question, is that in the first clause, in the words immediately following those creating the Corporation, and commencing the description of its powers, and which are as follows: "shall and may purchase and acquire to themselves, or take and receive upon free gift and donation, any lands, tenements, or hereditaments, within this jurisdiction of the Massachusetts, not exceeding £ 500 per annum, and any goods and sums of money whatsoever, to the use and behoof of the said President, Fellows, and scholars of the said College; and also may sue and plead, or be sued and impleaded, by the name aforesaid, in all courts and places of judicature within the jurisdiction aforesaid";—thus ending with a period and concluding a paragraph, having no reference whatever to the consent of the Overseers as being essential to the validity of such acceptance.

The next clause includes only authority to appoint a seal. The third gives the power of choosing officers and servants and of establishing their salaries,— and of making orders and by-laws, "provided the said orders be allowed by the Overseers"; and the fourth, that of making conclusive bargains for the purchase of lands and tenements. The fifth does not mention the subject of accepting or receiving of donations. Nor is it named in the Appendix.

Your Committee are not aware that any stress is intended to be laid upon the word *free* as used in the first clause, as being intended to vest in the Corporation power to receive only gifts unencumbered by conditions, or especial trusts. Such construction would obviously deprive it of all power to receive any gifts unless thus unencumbered, and so render the great majority of past acceptances invalid. Nor could any consent of the Overseers cure the difficulty, for they clearly have no power to approve of any which the Corporation has not the right to receive. The word *free* is obviously used there to distinguish gifts from purchases or donations requiring a consideration for the benefit of the donors, vendors, or grantors.

Your Committee, from this summary of the Charter, consider it too plain for argument, that no authority is vested by it in the Overseers to control the Corporation, or interfere with its action upon the subject of donations; deeming the impossibility of applying the proviso above quoted, or that in the fifth clause, to this subject, upon any construction, however latitudinarian or strained, to be too apparent to need further answer.

But although the Committee of the Overseers do not refer to any express provision in the Charter in support of this claim, they do attempt to support it by the statement of a reason, which they think entirely satisfactory, founded in a supposed necessity growing out of an imagined liability on their part, rendering its exercise essential to their self-protection.

They say that they "are persuaded that the vote of the acceptance by the Corporation is not sufficient and complete until such vote is concurred in by this Board (of the Overseers). *Otherwise the Overseers might be obliged or compelled by an order of court to aid in the execution of a trust which they have not sanctioned, nor ever would have consented to, if the same had been laid before them for their approval.* The Committee *therefore* are of opinion, that it is the duty of the Corporation to submit to this Board the question of the acceptance of every donation accompanied by a special trust, or imposing some particular obligation upon the government of the College." (Rep. pp. 10, 11.)

Your Committee desire humbly to say, with all respect to the learned Committee by whom the Report was made, and the Honorable Board by whom it was adopted, that they are as unable to find in what code of laws, or upon what legal principle, any such liability of the Overseers can be supposed to exist, as they are to discover in what part of the constitution of the College the power thus claimed resides. The idea that a body, established with visitatorial or supervisory powers only over certain acts of a corporation, but having no legal or beneficial title to any of

its estates, no corporate seal, and no ability to originate any act upon which the question of its liability could arise, and responsible only for the exercise of an honest discretion in approving or disaffirming of those acts, the corporation alone being intrusted with the primary administration of its affairs and estates, can be liable to be sued at common law, or in equity, and compelled to give its assent to such acts against its own judgment and will,—seems to your Committee, in all humility, a novelty in jurisprudence, the authority of which they are not prepared to recognize.

Besides, if it were admitted that such liability under any circumstances exists, it seems to your Committee obvious, that, as the only duty imposed upon the Overseers is that of the exercise of an honest judgment in matters submitted to them by the Corporation, that judgment being made in itself conclusive, no court or other human power could lawfully interfere to compel their assent to a measure which in such exercise of judgment they should disapprove: *for the constitution of the College, and the law in reference to it, make that judgment final and without appeal.* It could therefore be only in cases of factious, oppressive, or corrupt refusal to give assent to acts of the Corporation lawfully requiring it, that any judicial authority could be applied, supposing that the right of appeal to such could ever exist. And of course such cases must be supposed impossible.

Your Committee therefore are unable to find in the Charters, or in the reasoning set forth in the Report to the Overseers, any ground upon which they could feel justified in recommending to this Board the surrender of a right, which they have hitherto always understood to be vested in it, and one which it is their duty to maintain.

They turn, therefore, to the only remaining evidence adduced in support of this claim, and which is supposed to be found in the history of the College upon this subject. They would premise, however, that, even if such history

gave seeming authority for it, they should think it an unsatisfactory argument in support of one so manifestly, in their judgment, against the plain provisions of the Charter; for they entirely agree with the Committee of the Overseers in their views with regard to the influence of any such history in such cases, as expressed in their Report (p. 17), though they do not apprehend the need of resorting to any such principle in this investigation.

It is further manifest, that the mere circumstance of sending up by the Corporation of votes accepting important donations, where no questions had arisen, even if the instances were numerous, would have but little tendency to establish an obligation to do so on the ground that the consent of the Overseers was essential; inasmuch as such procedure would be amply accounted for by the consideration, that the joint action of the two Boards would be a more emphatic and grateful acknowledgment of the favor, than the act of one only. And this would be especially so in the early history of the College, when the Board of Overseers was composed in the manner and exercised the influence above stated. Still, as before, your Committee are not aware of any need of this or any other salvo, as the cases of such reference to the Overseers, cited by the Committee in their Report, or discovered on the records, instead of being numerous, are very few, and scattered over great spaces of time.

Again, it is obvious that cases in which donations were given as foundations for new professorships, and in which the vote accepting the donation, and the orders and rules for the establishment and government of the professorship, were sent up together, as constituting the entire proceedings of the Corporation on the subject, are not in point to show any recognition of a corresponding obligation to send up the acceptance alone considered for confirmation. The validity of the orders and rules unquestionably demands such concurrence.

In confirmation of their views upon this subject, the

Committee of the Overseers refer to the establishment of the Hollis Professorship of Divinity,—which, being the first professorship instituted in the College, may doubtless with propriety deserve notice in this relation. But all which they state is, that “it appears by the records of this Board (of Overseers), that the proposal of Mr. Hollis to endow a Professorship of Divinity was by the Corporation laid before the Overseers, who expressed much gratification on the occasion, and appointed a committee to prepare an appropriate letter of thanks to this distinguished benefactor of the College.” (Rep. p. 11.) The date of this vote is not given, but it was in January, 1722.

The only inference seemingly intended to be drawn from this citation is, that the Corporation acted under the acknowledged obligation to send up for concurrence and approbation the acceptance of a proposal for an endowment. But upon turning to the records of the Corporation, we find that in April, 1721, they first received notice of the intention of Mr. Hollis to found such a professorship, with certain rules and orders proposed by him for its government; and that on the twenty-first day of June following they passed a vote returning to him their thanks for his bounty, and expressive of their approbation of the proposed rules; and on the twenty-eighth day of the same month elected Mr. Wigglesworth a professor, and sent to Mr. Hollis the nomination for his approval. In January, 1722, they for the first time laid the subject before the Overseers, as “the pious and generous proposal of Mr. Thomas Hollis, of London, merchant, for the establishment and endowing of a resident Professor of Divinity at the said College, including a draught of rules and orders relating to the said professor.” The Overseers, after some debate, voted to establish the professorship; and the rules and orders, with some amendments, were adopted. And at an adjourned meeting the appointment of Mr. Wigglesworth, who had in the mean time been again elected by the Corporation to the chair of the professorship, for reasons of policy

not necessary to be here stated, was confirmed. So far, therefore, from the Corporation's having acted upon any received understanding, or implied admission, of an obligation to ask for the consent of the Overseers to the acceptance of a donation, the case, taken in all its connections, seems to your Committee rather confirmatory of the contrary doctrine.

The Committee add, that, "at divers times, questions respecting donations have been presented to the Overseers and acted upon by them, *and votes of thanks to the donors* have often been passed." No particulars are stated, and no references made, by which the pertinence of the cases referred to may be ascertained; but if all that appears "is that votes of thanks were passed," it amounts to very little towards sustaining the claim made of a right to reject the gifts.

After this introductory example and general remark, the Committee of the Overseers proceed to adduce four other instances of the action of the two Boards on the subject of donations, ranging from the year 1791 to the year 1855, a period of sixty-four years,—the first also occurring one hundred and forty-one years after the date of the Charter,—in order to show "*what has been the practice in this respect.*" (Rep. p. 11.)

The first cited is that of the bequest by the Hon. James Bowdoin of £ 400, in 1791, seventy years after the Hollis donation before mentioned, for the providing of premiums for Dissertations. The Committee in their Report to the Overseers set forth the preamble and vote of the Corporation accepting the "legacy upon the conditions pointed out by the testator," *and authorizing the Treasurer of the College to receive the same*; and that, this vote being presented to the Overseers, they voted to concur with the Corporation in accepting the legacy, and *in appointing* the Treasurer to receive it; that a committee of the Overseers was then appointed to consider what was proper to be entered on their records relative to this legacy, which committee

made a report expressive of the sense entertained by the Board of the attachment of Mr. Bowdoin to the College, and of his eminent services in its behalf, and the same was adopted. And this is put forth as proof of the practice of the Corporation to send up votes of acceptance of donations to the Overseers, and of the necessity of their concurrence therein to render them effectual or complete.

When it is remembered that Mr. Bowdoin had long been the most active and generous member of the Board of Overseers, and had rendered in many ways distinguished services to the College, — and when it is seen that, after the passing of the vote of concurrence, which in ordinary circumstances was all that would have been done, an especial complimentary additional one in reference to his services was also passed, — these proceedings might be considered as very satisfactorily accounted for, without supposing them founded in any sense of duty on the part of the Corporation, or any claim of right by the Overseers, making necessary their confirmation of the acceptance of the gift. But if the Committee had pushed their inquiries a little further, and examined the will by which this gift was made, they would have found that *a concurrent vote was, by the terms of the donation, made essential to the reception of the money by the College.* It contains this provision: "The four hundred pounds aforesaid to be paid *to whomsoever the Overseers and the Corporation* of the University shall empower to receive the same." It cannot, therefore, be relied upon as a case showing a practice founded upon a principle recognized by either Board, — nor indeed any practice whatever.

The next case cited is that of the gift by deed by Mr. Parkman of a township in Maine, represented as in 1814, for the establishment of another religious professorship in the College. But the only proceedings referred to are the vote of the Corporation in that year, "that the documents relating to the donation of Samuel Parkman, Esq., of a township of land for the purpose of promoting the interests

of religion and science, and of religious and scientific education in the University, with the vote of the President and Fellows on the subject, be laid before the Honorable and Reverend the Overseers, and they be requested, if they see fit, to concur in said vote," and the fact that the same was concurred in by the Overseers. (Rep. p. 12.) The vote of the Corporation here referred to was one passed upon the receiving of the deed at that time, and was to accept the donation upon the conditions imposed. The Committee omit to cite the vote of the Corporation in February, 1813, a year previously, to receive the proffered donation of Mr. Parkman for the support of an additional theological professor, which appears never to have been sent to the Overseers. And they also omit the subsequent vote of the Corporation, accepting a donation of five thousand dollars for the purpose of completing the foundation of that professorship in 1840, on the conditions proposed, the consent of the Overseers to which appears never to have been received or asked for, or made a subject of inquiry. The whole case, therefore, is one at best of very doubtful authority for the claimants.

The third case relied upon is that of the donation of the Hon. Nathan Dane, the Committee citing the following vote of the Corporation: "Voted, that this Board accept the donation of the Hon. Nathan Dane for founding a Professorship of Law, on the terms and conditions set forth in his communication to the Corporation, dated June 2d, 1829; and that the *above proceedings* be laid before the Overseers, that they may approve the same, if they see fit." They also add, that "this vote, being laid before the Overseers, was concurred in." (Rep. pp. 12, 13.)

If this were a statement of the whole case,—and the words "the above proceedings," in the vote, related only to the reception of the letter and acceptance of the donation previously mentioned in it,—it would constitute one in which the acceptance of a gift upon conditions was by the Corporation made subject to the consent of the Overseers.

But at the same time it would be obvious, that the proposed establishment of such a new professorship was an occasion calling for such communication of the fact, both out of respect to the Board of Overseers and the donor, because of the magnitude of the occasion, and that the donor might receive the acknowledgment of both Boards. It is, however, an incomplete statement of the case; *other votes* of the Corporation, *establishing the professorship and electing the Professor*, were sent up with the vote of acceptance, and constituted a part of "the above proceedings" which the Overseers were requested to concur in; *these being subjects always so referred*. Emphasis seems intended to be laid upon the fact, that Judge Story was then a member of the Corporation. But when it is remembered that one of the conditions or proposals of Mr. Dane, attending the donation, was that he should be the first Professor, it will not be considered very remarkable that he should desire his election to be submitted to the Overseers, even if it had not been customary always to refer such appointments to them.

The last case referred to by the Committee is that of the donation of Miss Plummer, in the year 1854, for the establishment of a new professorship in the University; and which became the subject of an elaborate Report, made by a committee in April of the following year. The Committee of the Overseers, in the Report under consideration, say that "the language and action of said committee may be regarded as a distinct expression of opinion by them, that every donation, accompanied by a trust, should be laid before the Overseers for their consideration, and be acted upon by them." (Rep. pp. 13, 14.)

If this fact were so, the utmost that could be inferred from it would be, that another committee of the Overseers had very recently expressed this opinion. It could with no propriety be urged as any proof of *the mutual understanding of the Boards*, and still less of any *established practice* regulating their proceedings; it should rather be regarded as

occasioning or prompting the present movement, than as evidence of the establishment of the claim contended for. But your Committee, after the most careful perusal of that Report, are wholly unable to find any authority for this representation. On the contrary, it there appears distinctly that the donation had been accepted, and a suitable acknowledgment had been directed to be made to the executor of Miss Plummer's will, nine months before any reference of the subject to the Overseers, and that the vote of such acceptance and acknowledgment had never been submitted to them for concurrence; nor is any intimation therein given that this omission was a subject of complaint. The only votes of the Corporation submitted to the Overseers were those establishing the rules and statutes of the professorship, which by the Charter must be so submitted, and the appointment of the Professor, which by uniform usage always has been thus referred. The resolve recommending "that the Overseers do cordially and gratefully concur with the Corporation in the acceptance of the bequest of the late Miss Caroline Plummer, and in the establishment of a new professorship agreeably to the terms of that bequest," was a fitting and graceful tribute by that Board of its acknowledgments, due to so distinguished a benefactor of the College; but can, as your Committee think, with no propriety be tortured into an assertion of their claim to consider their concurrence in such acceptance essential to its validity. It has therefore, as your Committee believe, no tendency to support the claim in this behalf contended for by the Committee in the Report now before them.

They submit, therefore, that there is an entire failure of historical evidence in favor of that doctrine, so far as the cases cited by the Committee are relied upon. But they are unwilling to leave the subject here. Having been thus invited into this field, they beg leave to present some results of their own investigations upon this subject, which they are constrained to believe must have escaped

the observation of the learned Committee in their researches.

The doctrine contended for by the Overseers embraces all donations in aid of professorships and charities previously established, as well as all intended to be thereby newly instituted; and under it all would indiscriminately require their assent to render acceptances of them valid. But the records of the Corporation and the Treasurer's accounts are filled with cases of this sort, in not one of which, as your Committee believe, has such reference to the Overseers been made.

There is an early case on record, in 1669, in which both Boards, having met for the choice of a Treasurer, as was necessary, returned a vote of thanks to Mr. Henly of England for a gift of £ 275; but no formal concurrence in the acceptance is so much as hinted at. Here also the accuracy of the notions then entertained of the relative powers and duties — or perhaps, more properly speaking, influence — of the two Boards, is illustrated by the vote concerning the Treasurer, which was: “The *Overseers*, with the consent of the President and Fellows, *elected* John Richards Treasurer.”

In the spring of 1719 Mr. Thomas Hollis made his first gift, which was in books for the Library, and money for aid of indigent students. In the month of April, in the following year, he transmitted a further large sum for the same purpose. Both branches of the College, as was to have been expected, were desirous to express their grateful acknowledgments for benefactions so generous and timely. On the 24th of May, the Corporation voted their thanks to him. And on the 23d of the month of June following, the Overseers appointed a Committee to prepare a letter of thanks, which, being reported and approved, was sent to him. The vote of the Corporation was not sent up to them; and the idea of their consent, as being necessary to the validity of the acceptance, seems never to have entered the thoughts of either Board.

One of the next important donations in order of time was by the same great benefactor, for founding the Professorship of Mathematics and Natural Philosophy which bears his name. He had prepared and sent over certain rules and *orders* for its foundation and government; and in April, 1726, his proposal to establish it, and his nomination of Mr. Greenwood as the first Professor, were laid before the Corporation; who voted to accept his proposals, and to return to him their thanks "for his repeated bounties to the seminary, and in a very particular manner for his most generous and surprising proposal of a Professorship of Mathematics and Experimental Philosophy," &c. This vote was not sent up to the Board of Overseers. On the eighth day of June following, the Corporation acted upon the several plans for *rules and orders* proposed by Mr. Hollis, and, after some alterations, transmitted one of them to the Overseers for their approbation. On the sixteenth of that month, the Overseers passed the rules and orders, with some amendments, and directed a letter expressive of their thanks to be sent to Mr. Hollis. But it was not until May, 1727, that they were finally adopted by both Boards, and a Professor was elected. In all these proceedings we look in vain for any intimation of any understanding or pretence, by either Board, that the consent of the Overseers to the acceptance of the donation was considered important.

On the fourth day of September, 1764, the Corporation passed a vote to request the executors of Mr. Thomas Hancock to pay over the fund bequeathed by him for the establishment of a professorship, which was not sent up for concurrence. On the nineteenth of the same month, the Corporation voted to accept the bequest and establish the professorship, and on the second day of the next month appointed a Professor. On the same day all these votes were together presented and concurred in by the Overseers. It affords no argument, therefore, in favor of the claim now made; for had such confirmation of acceptance been thought

needful, the Corporation could not have asked for payment before obtaining it.

The fund for the Boylston Professorship of Rhetoric and Oratory was received by the Corporation, February 11, 1772, and invested to accumulate, without any reference of the proceedings of the Corporation on the subject to the Overseers.

That for the Hersey Professorship the Corporation voted to receive and invest, in November, 1772. But there is no reference to it in the books of the Overseers, until a question arose respecting it after the Revolutionary war.

The fund given by Governor Pownall to found a Professorship of Political Law was accepted by the Corporation in January, 1784, and no reference to it is found in the books of the Overseers.

That for the establishment of the Alford Professorship was accepted by the Corporation, March 31, 1789, and never referred to the Overseers; and no allusion to it appears on their records until the professorship was established, more than twenty years afterwards; when the vote for founding the professorship and appointing the Professor were presented for concurrence.

In June, 1798, the Corporation accepted a donation in money from Jonathan Mason for the Divinity Professorship, of which no such reference was made.

In June, 1801, a donation of an annuity of \$ 100 from Mr. Boylston, for additions to the Anatomical Library, was accepted by the Corporation, and never referred.

In 1805, when funds were raised to found a Professorship of Botany and Natural History, the Corporation sent up for concurrence votes founding the professorship, prescribing its rules and orders, and appointing a Professor, all at the same time, but without any vote of acceptance.

In August, 1810, the Corporation accepted the legacy of \$ 5,000 from Samuel Dexter, for promoting a critical knowledge of the Scriptures, but it was never sent up for concurrence.

In April, 1814, a gift of \$ 20,000 was made by a benefactor, then unknown, (the Hon. Samuel Eliot,) who desired that his name should not be disclosed by the person transmitting it, to found the Greek Professorship. The Corporation immediately passed votes accepting the donation, and expressive of their gratitude for this generous benefaction; but it was not thought necessary to send them up to the Overseers, that they might concur in its acceptance. It was not until February, 1815, when the rules and statutes were enacted, and the Professor was chosen, that any votes were sent up for concurrence.

In September, 1815, the Corporation appointed agents to receive the legacy of Count Rumford, and voted to found the Rumford Professorship. But no reference of the subject to the Overseers was made until October, 1816, when the statutes of the foundation were presented for concurrence.

In December, 1823, the Corporation received notice of the bequest of John McLean of \$ 20,000, to found a Professorship of History, and voted to present their thanks to the executors. But no request was made to the Overseers to join in its acceptance; nor does any reference to them appear upon the subject, until the vote to found the professorship was sent up in 1839.

In 1831, the donation of Mr. Dane for the erection of a building for the Law School (Dane Hall) was accepted by the Corporation; and subsequently was so appropriated, without any reference upon the subject to the Overseers.

The general result, therefore, of the evidence upon the *practice* of the two Boards appears to be this. In no instance, known to your Committee, has a vote of acceptance of a "donation upon a particular condition, or accompanied by a special trust," as being in aid of a previously existing professorship, or charity, been submitted to the Overseers for concurrence, though such donations have been numerous. In the cases of the Boylston, Hersey, Alford, Dexter, and McLean donations, the funds were ac-

cepted, and allowed to accumulate for many years, before they were ever brought to the notice of the Overseers otherwise than by the Treasurer's Reports. The Pownall fund, the Boylston annuity, and that bestowed by Mr. Dane for the erection of Dane Hall, were accepted and appropriated by the Corporation, and neither the acceptance nor the appropriation of either of them was ever referred to the Overseers.

When new professorships have been established, and the rules and statutes regulating them have been enacted at the same time, or when appointments of Professors have been made, they have always been referred to the Overseers; such reference of orders, rules, and statutes being expressly required by the Charter, and such reference of appointments being in conformity with a practice to be hereafter considered; and in some instances the votes thus sent up for concurrence have contained a clause declaring acceptance of the fund, as would very naturally occur without any intention on one side to admit, or on the other to claim, such reference as matter of right; and in some cases the rules and election only have been submitted, without allusion to any acceptance of the funds. No question appears ever directly or indirectly to have arisen upon this subject between the two Boards, until its suggestion in this Report; and the constant *practice*, as above shown, proves conclusively, as your Committee believe, that in no instance was a reference made of the acceptance of a donation for concurrence, in which it is not satisfactorily accounted for as required by the terms of the gift, or as constituting part of a vote upon subjects otherwise calling for such concurrence by the express terms of the Charter, as in case of orders, statutes, and rules, or in that of appointments according to the uniform practice above referred to.

The varied practice might seem to leave the question undetermined, whether votes merely founding new professorships or other new offices in the College should be sent up for concurrence; though in the majority of cases the votes

to institute such professorships have been sent up together with the rules and statutes for their regulation. The only question which appears to have arisen between the two Boards upon this subject appears in a vote of the Overseers, February 13, 1834, "that when the Corporation shall institute a College professorship, or any other office in the University, and shall present to this Board a person elected by the President and Fellows to fill such place, to be confirmed by this Board, the said President and Fellows shall assign in writing the necessity for such office, and the rules and regulations adopted pertaining to the same"; and in the vote of the Corporation, June 19 of the same year, at a meeting when the vote just mentioned was laid before that Board, "that the Corporation cannot recognize the right of the Board of Overseers to order them to assign in writing the reasons of any of their acts." And the order appears to have been subsequently entirely disregarded by both Boards.

Your Committee therefore submit, with entire confidence, that neither by the terms of the Charter nor the practice of the two Boards can it be maintained that the Corporation is under any obligation to send up for concurrence any vote accepting any donation of any kind; or that the Overseers have any power to interfere with, control, or prevent such acceptance; but, on the contrary, that the plain language and whole context of the Charter, and the uniform practice of the Boards, are conclusive against any such obligation on the one part, and any such claim of interference, control, or rejection on the other.

If it be argued, as was suggested in the conference of the two Committees, that this construction gives to the Corporation a dangerous and unlimited power of committing the College to the support of institutions and objects foreign or adverse to its interests, the answer is very simple; namely, that the Corporation has no lawful authority to accept any donation not within the scope of the objects of its creation, pointed out by the Charter, and of the powers with which it is thereby invested.

The Corporation, by the authority of the government conferred by their Charter, and by the trust reposed in them by donors and benefactors, are constituted the sole judges of the propriety of accepting such gifts, and of determining whether the objects proposed in any such donation are within the objects and purposes for which the Charter was granted. They are bound, not only legally, but *in foro conscientiae*, to the honest and faithful exercise of their judgment in this respect, as well as in the performance of every other part of the trust reposed in them for the best interest of the institution. They, and they alone, are legally responsible at the tribunals of the State for any improper failure or refusal to accept a suitable and proper donation, when proffered for the benefit of the College, as they would be for the acceptance of any such donation for purposes not within the scope of its Charter, or for the omission to use, or the perversion or abuse of, any one rightly accepted.

APPOINTMENTS.

Upon this subject, forming the next topic of the Report, the Committee are quite brief and summary; but it is a great relief to find that the foundation of the claim made for the right of confirmation or rejection of nominations to office in the College is clearly and distinctly stated, so that it may be openly examined, and its soundness or unsoundness satisfactorily ascertained, and is not left to uncertain inference or vague conjecture.

This claim is thus disposed of in the Report. The Committee (Rep. p. 14) say: "This [subject of appointments] seems to have been regarded at all times as a matter in relation to which the action of the Corporation did not take effect until the same was confirmed by the Overseers. The Corporation have therefore uniformly sent their votes *or orders*, by which appointments have been made, to this

Board [of Overseers] for approval." The use of the word "orders" in this sense will not have escaped observation; your Committee cannot find any warrant for it in the Charter, or in the records of either Board, early or late, but believe it to be wholly opposed to both, as it clearly is to the context of the Charter where it is employed.

Again (Rep. p. 15) they say, in treating of the subject of salaries: "It is provided in the Charter, in substance, as appears in the passage herein above cited, that the Corporation may meet and make such allowances to College officers or servants as they shall think fit; provided their orders or doings on the subject be allowed by the Overseers. This provision is contained in the very section, or part of the act, in which the matter of *appointments is regulated*, and that too by the same phraseology as is used touching salaries; and *it has never been questioned by the Corporation that all such appointments or elections require the confirmation of the Overseers.*" How far this can be considered a correct and just statement of the contents of the Charter, in the passage referred to, will be presently considered. It is adverted to now, in connection with the preceding passage cited, only to show the precise ground on which they rest their claim of control over appointments, and the extent of that claim. And it is thus expressly and unequivocally and exclusively based upon that provision which your Committee have designated as the third clause, and which is thus considered in the Report as covering all appointments.

The position taken by the Committee, therefore, is, that the Overseers, by virtue of the proviso in that third clause, have the right to require of the Corporation, and that it is the duty of that Board, to submit to them, for confirmation or rejection, all appointments to office in the College; and they affirm that "it has never been questioned by the Corporation, that all such appointments do require such confirmation."

It is true that appointments made by the Corporation to

offices of government and instruction have, from the earliest times, and, as is believed, with entire uniformity, been sent up to the Overseers for concurrence or rejection. Your Committee, however, are satisfied that it is no less true, that such submission of them has never been because of any admitted or supposed obligation on the part of the Corporation, or of any claim made by the Overseers, founded upon that provision in the Charter, but, on the contrary, that any such construction of it has been expressly repudiated by both Boards in their records and in their practice; and that the learned Committee are entitled to the credit of entire originality in any such application or construction of that clause. In order to maintain it, they assume that all appointments made by the Corporation, excepting in the election of members of their own Board, are made under the power given by that provision of the Charter, and that the words at the close of it, "provided the said orders be allowed by the Overseers," apply to such appointments. Your Committee have above shown, and, as they think, to plain demonstration, by the best of evidence, namely, the Charter itself, that this proviso admits of no such application (pp. 21 - 23). And they now proceed to the consideration of the next best evidence of which the nature of the case admits, namely, the records and actions of the two Boards; and which, they submit, is entirely confirmatory of that conclusion.

It is self-evident that this proviso, if it applies at all to appointments made under that clause, extends equally to every one so made, without discrimination of any one from any other. And also that, if it applies at all to salaries allowed under it, it includes every one so allowed. And further, that, if applicable to either appointments or salaries, it must be equally so to both; and *vice versa*, that, if it does not justly apply to any one such appointment or salary, it does not to any other. If, then, it can be shown that any one appointment, or class of appointments, or any one salary, or class of salaries, made or allowed under that clause,

has been and is, by votes and practice, considered as exclusively within the acknowledged control of the Corporation, without any right of interference on the part of the Overseers, it not only follows conclusively, that the Committee are entirely in error in taking the position above stated, and in saying, that "the Corporation have therefore uniformly sent their votes or orders, by which appointments have been made, to this Board [of the Overseers] for approval," and that "it has never been questioned by the Corporation that *all such appointments* or elections require the confirmation of the Overseers"; but it also follows conclusively, (so far as such proof is conclusive that the proviso does not apply to such particular case or class of cases,) that it does not apply to any other case or class of cases arising under that clause, and also that it affords no ground whatever for the right of control or interference concerning appointments and salaries as claimed in the Report.

The first instance in which any question seems to have arisen, that may be considered as involving the construction or application of this third clause, was in the remarkable attempt made by the Overseers in the first instance, and afterwards with the concurrence of the House of Representatives, to break down the Corporation, and remove three of its members, on account of hostility to their religious opinions, in the years 1721, 1722, 1723; and the successful resistance of which attempt constitutes, as your Committee suppose, one of those "trying and difficult occasions" referred to in the Report, in which the Corporation was "the bulwark of the College." (Rep. p. 26.)

This clause was not, however, then made the subject of especial reference or comment. A memorial of the Overseers for an enlargement of the Corporation, having been presented to the General Court in 1722, was referred to a committee, which reported several Resolutions, and among others one in these words: "Thirdly, that the President and Fellows of the said College, or the major

part of them, are not warranted to fix or establish any salary or allowance *for their service*, without the approbation and consent of the Overseers." The Report was accepted by the House, and concurred in by the Council; but the Governor refused his assent, for reasons not pertinent to this inquiry. In the session of 1723, the House again passed the same Resolves, without notice to the Corporation, and notwithstanding their earnest solicitation to be heard upon them at the preceding session, and sent them to the Council for concurrence. The Council, however, granted the hearing, and thereupon non-concurred in the Resolves; and they were never afterwards heard of in either branch of the Legislature.

It will be observed, that this denial of the power of the Corporation to establish salaries was strictly confined to *those established for themselves* (the Corporation then embracing a majority of the instructors); and was not extended to any question of their authority to appoint the salaries of other persons not members of the Corporation. And this circumstance is in itself exceedingly strong evidence, and seemingly conclusive, so far as negative evidence can be so, that no question was considered to exist of its exclusive authority to establish the salaries of officers and servants appointed by it under the third clause; for if there had been, the denial would have included that also.

And the reply of the Corporation, in their memorial to the General Court, is conclusive, that, up to that period, no reference of any such appointments had ever been made to, or claimed by, the Overseers as due to them. They say: "But we do not find that it [the Charter] leaves them [the Overseers] *any power in the matter of fixing and establishing any salaries or allowances*, or disposing of the incomes and revenues of the College." Again: "*We know not of such allowances being at any time brought to the Overseers for their fixing of them.*" And one of their chief arguments against the proposed change in the organization of the Corporation, which was to have it com-

posed of resident instructors, was the clear construction of the Charter, and settled usage under it, giving to that Board the exclusive authority over salaries, and which ought not therefore to be in the hands of a majority thus interested in its exercise.

No more satisfactory evidence could exist, that, up to that period, being seventy-three years subsequently to the date of the Charter, no practice or understanding had existed tending to show that the Overseers ever had exercised or claimed any power over the establishment of salaries appointed by the Corporation under the third clause, or that the Corporation had ever by vote or action recognized any such power. And such entire absence of any claim or recognition of such right, for such a space of time, upon the records of the Corporation or of the Overseers, and such denial by the Corporation as soon as presented, and the subsequent acquiescence of the Overseers and General Court in the decision of the Council, are, as your Committee think, satisfactory evidence that no such right or obligation existed. And if none existed over salaries, it is equally certain that there could be none over appointments made under that clause.

The next occurrence which may be considered as having a bearing upon this question is the Report of a committee of the Overseers, appointed in 1732, to take into consideration the condition of the College, and to "report proposals for its benefit." The College was at that time in great disorder; and the committee in their Report, representing it to be in a weak and declining state, recommended several propositions; the first of which was for the revival of the laws, and their better adaptation "to the present circumstances of the society"; the second, that the salaries of tutors and instructors be paid quarterly; and the third was in these words: "Whereas heretofore, under the present Charter, salaries were wont to have the allowance of the Overseers, that the Overseers do now assume their right of *stating and allowing* salaries agreea-

bly to the ancient practice." The Board amended this proposal by substituting the words "consenting to" for the word "stating." This last proposal implies a belief, then existing in the Board of Overseers, that they had formerly exercised a *supervisory power over salaries established by the Corporation*. But this was clearly an error, as there is no instance of the exercise or admission of any such power upon the records of either Board; and it was also a misapprehension which may be very satisfactorily accounted for, as will be shown when the subject of salaries shall be under special consideration.

These three proposals, with others not material in this inquiry, were accepted by the Overseers, and transmitted to the Corporation. And the two Boards proceeded forthwith very harmoniously to revise and establish a code of laws, in the manner prescribed by the Charter. But no subsequent notice appears ever to have been taken by either Board of this third proposal,—the Overseers, as your Committee suppose, being satisfied, upon investigation, that it was made, as just stated, under a misapprehension of the previous history of the College, by no means unnatural, and easily accounted for.

The entire abandonment of any further consideration of the subject by both Boards is, as your Committee think, very strong evidence that no such right was upon final consideration believed to exist. Otherwise there seems to be no reason why, after being thus solemnly and publicly asserted, it should not have been persisted in; especially as the state of the College was such as to give to the Overseers the entire advantage in any discussion of the question, and a motive for pressing it, so far as the relative influence of the two Boards and the need of reform were involved.

And this conclusion is strikingly confirmed by the proceedings of the two Boards, and especially by those of the Overseers, upon the next agitation of the subject of salaries, which took place in 1760,—proceedings which are

adduced by the Committee in their Report (pp. 18, 19) as affording satisfactory, if not conclusive, proof of the validity of the claim which it is their object now to maintain. How far the representation of these proceedings in the Report corresponds with what your Committee believe to be their real character and purport, and what may be their just influence upon the question in hand, will be very carefully considered when examining the argument upon the subject of salaries. They are referred to here only to show that, at that time, the Overseers not only did not pretend to any such claim of supervision or control over appointments made, or salaries established, *under this third clause*, as is now attempted to be maintained, but expressly repudiated and disclaimed it.

Those proceedings embraced a Report then made to the Overseers by a committee, the members of which are considered, by the authors of that now under consideration, so eminently able to settle such a question, that their names are set forth at large (Rep. pp. 18, 19) by way of giving emphasis to its conclusions. That Report* is on file in the College archives, with the Memorial of the Corporation† in reply. The present Committee of the Board of Overseers state the fact that such a Report was made, with its date and the day of its consideration, and the circumstance that it was directed to be served upon the Corporation;—they forbear, however, any citation or recital of its contents. Had they attempted any, it would have appeared that the Committee who prepared it, and the Overseers by accepting it and sending it down to the Corporation, not only wholly disavowed any authority to control or interfere with appointments, or salaries made or established under this third clause, which they particularly cite, but rested their argument in favor of their right to such supervision and control over the appointments and salaries of those in the government of the College upon another clause, and

* Appendix, No. IV.

† Appendix, No. V.

with the express declaration that the third, which *vested exclusive power in the Corporation*, applied only to certain officers and servants other than those in the government of the College, — “*and the choice of whom,*” to use their own language, “*is in the Corporation, INDEPENDENT OF THE OVERSEERS.*”

No disavowal or renunciation by the Overseers themselves of any claim of right to control or interfere with the appointments made, or salaries established, by the Corporation, under the third clause of the Charter, more emphatic and conclusive than this, can be imagined; and yet this Report constitutes a prominent portion of the evidence adduced, and in the most confident manner, as entirely satisfactory proof of the existence of such right. (Rep. pp. 18, 19.)

The next occasion on which the construction of this *third clause* came in question was in 1778, in a controversy between the two Boards concerning the right of the Corporation to elect a Steward without requiring the confirmation of the Overseers. And it is of a nature the more decisive, as their respective powers in that respect were to be determined *solely by that clause*. Hence it deserves particular recital.

In November, 1778, upon the resignation of Jonathan Hastings, Mr. Kneeland, a man of great worth, and well qualified for the office in the opinion of the Corporation, was by that Board appointed Steward; but his political principles rendered his appointment objectionable to the Overseers. They therefore, at their next meeting, passed a vote declaring that his election “was disagreeable to this Board, and that it be recommended to the Corporation to reconsider said election, and proceed to the choice of some other person for that office: *the Overseers reserving to themselves the right they have by the Charter, of approving or negating the election of a Steward made by the Corporation.*”

In December the Corporation met, and reconsidered their

appointment of Mr. Kneeland, and requested the former Steward to resume his place until another should be chosen ; and passed a vote declaring "that the Corporation are of opinion, that the claim advanced by the Overseers of a right to approve or negative the election of a Steward made by the Corporation has *no foundation in the College Charter, and is without precedent in any of the College records ;* and that the President, Dr. Cooper, and Mr. Lathrop be a committee to represent the sentiments of the Corporation on this point to the Board of Overseers, and bring the matter to as amicable a decision as possible."

At a meeting of the Overseers in the same month, they adopted the following vote : "It being a matter in dispute between the Corporation and Overseers, whether the election of a College Steward ought to be presented to this Board for their approbation, and the Board not being in possession of the Charters by which this point ought to be decided, it was voted that the Secretary be directed to deliver to the President of the Council, as soon as may be, copies of the Charter granted by the General Court in the year 1642, and of that granted in 1650, and of the Appendix granted in 1657, for the inspection of the Overseers, that they may be better able to discuss the matter in dispute, and to come to a determination upon it, at the adjournment of this meeting."

On the sixteenth of the same month, the adjourned meeting was held ; and it appears by the record, that, "after some debate, it was moved that the previous question should be put, Whether this Board have a right to a presentation of the person elected by the Corporation into the office of Steward, for their approbation or disapprobation ; whereupon the previous question was moved, whether this question shall now be put, — which being put, it passed in the negative."

The Corporation afterwards proceeded to elect a Steward, without submitting the appointment to the Overseers for their consent ; and such has been the uniform practice ever

since ; nor has this acknowledged right of the Corporation ever been further questioned.

It will be observed that this question directly and necessarily involved the construction of the third clause in the Charter, and of its proviso ; for whatever may be thought of the power of the Corporation to elect officers of government and instruction under it, no doubt can exist that the election of a Steward is within its express provision.

We have, therefore, the well-considered and deliberate decision of both Boards, — after a full examination of all the Charters laid before that of the Overseers, “ that they might be better able to discuss the matter in dispute and come to a determination upon it,” — that the proviso in that clause gave them no power whatever over appointments made under it. Nor is this all. It will be seen by reference to the College records, that elections of officers other than those of government and instruction, and which were confessedly all appointed in exercise of the power given to the Corporation by that clause, have never, or, if ever, with very few exceptions, been presented to the Overseers for their concurrence or disapproval ; but that the Corporation has uniformly exercised the sole power of making such appointments as exclusively its own, and unquestioned by the Overseers. If that of the Librarian should be supposed to be an exception, it will be found not to be one, inasmuch as he was not thus presented by the Corporation before 1766 ; when he was invested with the authority of a tutor, and thus became one of the Government.

And yet the learned Committee, in this elaborate Report, representing that all powers of appointment to office possessed by the Corporation, including those of government and instruction, are derived from this third clause, and especially citing it to that effect (Rep. pp. 15, 16), maintain that the proviso at its close applies to all such appointments, — as it plainly must, if to any, — and that none can be valid without the approval of the Overseers ; and affirm that “ it has never been questioned by the Corporation, that

all such appointments or elections require the confirmation of the Overseers." Such a result of their investigations is certainly a striking illustration of the truth of their remark (Rep. p. 1) when alluding to the task imposed upon them, that their constituents, in requiring its performance, could hardly have been aware "how extensive was the field of inquiry which the Committee were required to examine, or how imperfectly the same had been previously explored."

Your Committee therefore submit, with entire confidence, that no proposition can be more clearly established, upon the plain meaning of the Charter, and the well-considered, deliberate, and recorded construction of it by both Boards, and their uniform practice under it, from the day of its date, than that the proviso at the close of the third clause has no reference whatever to the appointments to office, or the establishment of the salaries, for which that clause provides. And if, therefore, all the powers of the Corporation to make appointments to office in the College are derived under that clause,—as the Committee assert, and by citation and argument attempt to maintain,—then the only and whole foundation of their claim of any right on the part of the Overseers, under the Charter, to have appointments presented for their confirmation or rejection, fails, and is utterly swept from beneath their feet. Under the Charter, the Corporation has the exclusive right to make them, independently of any such approval or disapproval.

But although your Committee have no doubt that this is the just and only view to be taken of the claim so made by the Overseers, and that it has no such foundation as their Committee appear to suppose, they are aware that the practice of the Corporation to send up for concurrence or rejection all appointments to offices of government and instruction in the College, and which appears to have obtained from the earliest times, as has been before fully conceded, remains to be explained. And it is believed that an explanation is by no means difficult, and one which may lead not only to a solution of this particular inquiry, but also to a just

apprehension of the relative positions of the two Boards upon this very important and delicate subject.

There can be no doubt that the phraseology of the third clause, taken by itself, would suffice to vest in the Corporation the power of appointment to all College offices whatsoever, required for government and instruction, and other management of the institution and the ordering of its affairs, excepting that of electing officers and members of its own Board; and would also be sufficiently expansive to embrace all that should become needful by the growing exigencies of the College, as well as those contemplated at the granting of the Charter. And your Committee, for reasons hereinafter stated, concur in opinion with the Committee of the Overseers, that it is from this clause that the Corporation derive the powers which they have exercised and continue to exercise in making all such appointments. If, however, no power had been expressly given by the Charter to appoint officers and servants for the purposes above mentioned, it would have been inherent in the Corporation by force of law, as implied by necessity, for the purpose of enabling it to accomplish the objects of its creation. In either case, however, it is clear that the Overseers could have no power of supervision or control over such appointments, because none is vested in them by their own Charter, and no other clause in that of the Corporation, or in the Appendix, has any reference to that subject but the third, and this gives them no such power; and there is no other source whence any such could be derived.

The difficulty has arisen, therefore, not from any insufficiency in the terms of this clause, taken alone, to embrace all appointments to College offices, but from the restriction put upon their general import by other expressions in other parts of the Charter; from which the inference has been drawn, that the words "officers and servants" were intended to be used as descriptive of ministerial agents, such as steward, librarian, janitor, and the like, as contradistinguished from those composing the Government

of the College; and there is certainly some reason for thus believing that this distinction was then in the minds of the framers of the Charter.

The first known suggestion of this construction is found in the effort of the Overseers, alluded to above, to maintain their claim of supervision and control over the salaries of the governors and instructors, in 1761; when they were solicitous to get rid of the third clause, as being the source of authority in the Corporation for their appointment, perceiving, and expressly conceding, that, over elections and salaries made and established under that clause, the Overseers had no supervision or control. They therefore sought to show that it applied only to such ministerial agents, and not to those employed in the government or instruction of the College; and rested their whole argument for any such claim over appointments of the last-named officers upon the hypothesis, that the power to confirm or negative appointments involved that of regulating the salaries of the appointees, and upon the fifth clause, which it cannot be pretended has any the remotest bearing upon the subject of election to office.*

There is not, however, as your Committee know, or believe, any evidence whatever that the Corporation ever acceded to this construction; but, on the contrary, it appears, as will presently be shown, that they have uniformly maintained the exclusive right under the Charter of regulating the salaries of all officers appointed by them, which seems very strongly, if not conclusively, to imply that they rested such power of appointment, excepting of members of their own Board, upon the third clause; and your Committee are not aware that they have ever attributed it to any other source.

The origin and continuance of the practice of presenting to the Overseers, for confirmation or rejection, appointments by the Corporation to offices of government and instruction, is very satisfactorily accounted for in the history of

* See Appendix, No. IV.

the College, without attempting to force the proviso in the third clause into any such unnatural service, or seeking a solution of the question in any other construction of the Charter, if that were possible. When the Charter was first granted, all who then held such offices were expressly named in it as members of the Corporation, the appointment of whose successors, by its terms, required the concurrence of the Overseers ;— and its framers probably did not then contemplate such future increase in the number of officers of instruction and government as would render it impracticable or inconvenient thus to include them ;— though the holding of such office was not made a necessary qualification for such membership. The College was then but a small seminary, the number of pupils never having exceeded twenty-five, which continued the maximum for many years, the whole being under the charge and instruction of Mr. Dunster, — by the Charter made the first President, — and of perhaps two assistants, who were made Associate Fellows, these three, with other persons, constituting the first Board.

The vision of the magnitude, importance, and reputation of the University, as it now exists, had not then presented itself to the imagination of our fathers, any more than that of the present population, wealth, and industrial and intellectual pre-eminence of the Commonwealth which they were at the same time founding, or than that of the extent, power, and political importance of the great nation of which it was to become a member.

It appears by the records, that twenty-four years afterwards, and when it must be presumed to have materially increased, there were but three instructors beside the President ; nor does it appear that any addition to that number was made for many succeeding years. Nor until the year 1711, sixty-one years after the grant of the Charter, does there appear to have been any instance of the appointment of an officer of government or instruction by the Corporation, who was not at the same time elected a member of

the Corporation. The case of Mr. Whiting, who was a tutor at the time of the reorganization of the Board in 1707, and not then made a member of it, constitutes no exception, he having been appointed by the Governor during the period when the Charter was erroneously supposed to have been vacated by the repeal of that of the Colony, and holding equal rank with the other officers appointed in the same manner.

The first election by the Corporation of an instructor, not at the same time chosen to a seat at its Board, was that of Joseph Stevens, in 1711 ; — and it was sent up to the Board of Overseers for their concurrence. It would seem highly probable that this appointment was made under the influence of the Governor and Overseers, who enjoined upon the Corporation the manner of a formal inauguration, — showing an interest and participation in the transaction much exceeding those of mere concurrence in the election. Indeed, the slightest knowledge of the College history of that period suffices to show that all real power and control over the College were in the hands of the Colonial government and of the Overseers, and not exercised with a very scrupulous respect to the constitutional rights of the Corporation ; so that, while no question can reasonably arise as to the validity of their claims to those powers which they were allowed to exercise, very little weight is attributable to evidence arising from the assumption of power and authority over them by the then dominant party. Often no alternative was left to the Corporation but acquiescence in this irresistible power, though in some very important instances such acquiescence was accompanied with direct or implied protests against the usurpation.

Looking back, then, to the period of the first sixty years after the granting of the Charter, we find a perfectly clear and satisfactory account of the origin of the practice of submitting appointments to offices of government and instruction to the Overseers ; — all such appointments hav-

ing been at the same time to membership of the Corporation, and therefore, by the terms of the Charter, requiring such submission. Under any circumstances the practice would very naturally be afterwards followed, unquestioned, in all such appointments, though not including such membership; but under those which characterized the next seventy years, its continuance will be seen to have been at the least most wise and expedient, if not absolutely unavoidable, — considered altogether irrespectively of any obligation on the part of the Corporation to adhere to it other than on the ground of sound policy.

The nature of the influence and power of the persons composing the Board of Overseers during the first century and a quarter after the date of the Charter, over both the College and the Colonial and Provincial Legislatures, has been before alluded to; but this was by no means the greatest influence or power which that Board possessed. For a long period of time the College officers were chiefly maintained by grants from the Legislature, and the appropriation of them was committed to the Overseers; and the disposition of some of the earliest and most important donations of money to the College was in like manner placed in their hands. Thus they had at one time not only the weight of unlimited personal and political influence and authority, but also held the purse-strings of the College, and the sole power of appointing allowances. During the first seventy years of the existence of the College, "its officers were dependent for daily bread upon the bounty of the General Court. They always stood before the Court in the attitude of humble suppliants, destitute of the power even to enforce their rights; and found, by bitter experience, how miserable is he who hangs on a sovereign's favor, be that sovereign one or many, prince or people." And for the next sixty years or more, the College was mainly dependent upon grants of the General Court for means to pay the salaries of the President and Professors. It was therefore obviously not only natural,

but unavoidable, that the pleasure of so powerful a body as the Overseers, in itself closely connected with the College, and possessing controlling influence in the Legislature, should be made essential to acts of such importance as the appointment of officers of government and instruction; the number of whom at the breaking out of the Revolutionary war amounted to seven beside the President, Treasurer, and Librarian, there being then but three Professors and four Tutors.

Another series of appointments to offices of government and instruction requiring the confirmation of the Overseers, for a reason wholly independent of any constitutional obligation or claim of right springing from the Charters, commencing with the first establishment of professorships, and continuing to the present time, contributed no less effectively to constitute such presentation to them a received and uniform practice. In nearly all the foundations of professorships, such subjection by the Corporation of the appointment of the proposed incumbent to the concurrence or disapproval of the Overseers was required in express terms. Such was the case in the foundation of the first professorships established,—that of Divinity by Mr. Hollis, in 1722, and that of Mathematics and Natural Philosophy, by the same distinguished benefactor, in 1726; also in the foundation of the Boylston Professorship of Rhetoric and Oratory, in 1772; in that of the Alford Professorship of Natural Religion, Moral Philosophy, and Civil Polity, in 1789; in that of the Massachusetts Professorship of Natural History, in 1805; in that of the Eliot Professorship of Greek Literature, in 1814; in that of the Rumford Professorship on the Application of Science to the Useful Arts, in 1814. Even in those where the founders had not made this provision, the Corporation, in establishing statutes and rules for their foundation and government, either made the appointment of the Professor expressly subject to the consent of the Overseers, or impliedly so by a provision that he should be chosen in the

same manner in which other officers of the College were chosen. So that very nearly all the appointments to professorships have been thus submitted in accordance with the express requisitions of the founders of these professorships, and the others by votes of the Corporation voluntarily adopting the same mode as their organic law. All elections, therefore, to these chief offices of government and instruction are thus plainly and clearly accounted for, independently and exclusively of any legal obligation on the part of the Corporation so to present them for confirmation, or of any right on the part of the Overseers to demand such presentation, founded in the Charters, or in the legal constitution of the College.

When, therefore, it is seen that all the tutors in the early stages of the College history were members of the Corporation, whose election therefore was of necessity submitted to the approval of the Overseers,—and that all the first and nearly all the succeeding professors were appointed on foundations requiring such submission, and all the rest under statutes providing for it,—the fact that all other tutors and newly appointed officers of instruction should be also so presented, in conformity with this long-established practice, is sufficiently explained, without resorting to forced, novel constructions of the Charters, or to any other sources of the authority thus exercised by the Overseers.

In these views taken by your Committee of this subject, it may perhaps be immaterial to decide whether the power of appointments to offices of government and instruction is vested in the Corporation by virtue of the third clause of the Charter of 1650, or by legal implication from the necessity of such authority in order to accomplish the ends for which it was created; as in either case it is believed to be clear, for the reasons above given, that the Overseers can have no legal right of supervision or control over appointments made by virtue of authority derived from either source. But your Committee, as before suggested, are of

opinion that such power is derived from the third clause ; and are happy in this to find a subject of concurrence in the opinions expressed by the Committee of the Overseers. There can be no question, that the language of that clause is not only broad enough to cover all such appointments, but that such would be its natural and ordinary interpretation ; and that it is only by a critical collation of it with other parts of the Charter that any limitation of its terms can be inferred.

It may be, and indeed is not improbable, that the framers of the Charter presumed, at the time, that all such officers would be included within the Corporation, and that the third clause would be applied only to the appointment of ministerial agents of the character above suggested ; and furthermore, that if the idea had occurred to them of such an increase of the institution as should require a greater number of officers of instruction and government, they would have provided for the submission of their appointment to the Overseers. It does not, however, by any means follow, that the construction of the Charter of an institution for education, intended to be permanent, and in its nature susceptible of indefinite enlargement, is to be controlled by the precise ideas or anticipations which may be supposed to have been in the minds of its authors, when language is used, and provisions are made, in themselves wholly unequivocal and clear, and far more comprehensive than those precise ideas and anticipations could require, and sufficient to embrace, and seemingly intended to provide for, all future emergencies ; nor by the mere probability that they inadvertently, or through want of foresight, omitted a provision which they would otherwise have inserted. It is certain that they intended, by this clause, to provide for appointments to office to be made by the Corporation ; and that its language clearly, and in its ordinary natural import, extends to all appointments to office of every kind ; and that there is no other provision in the Charter giving any such power, excepting

that of election of members of its own Board. Now it seems incredible, not to say absurd, to suppose that they would take the precaution thus expressly and carefully to provide for a few officers only, and those of inferior grade and importance, and leave those upon whom the whole welfare and prosperity of the institution would mainly depend wholly unprovided for. Hence the reasonable inference would seem to be, that they intended by this clause to vest in the Corporation full power to make all such appointments as the emergencies of the College might from time to time require, whether more or less, and whether the same with or differing from those then anticipated to be needful.

A question here presents itself, how far the Overseers have acquired the legal right of such supervision and control over appointments, in cases where the Corporation — in instituting professorships or other offices of instruction or government upon foundations not requiring such submission, or upon grants or appropriations made from the general funds of the College — has, by the statutes establishing them, or the rules and orders concerning them, provided for such presentation to the Overseers; instances of which may be found in several of the professorships, in the establishment of the office of proctor in 1805, and in other cases. And your Committee are of opinion, that no such legal right exists in the Overseers, independently of the concurrent will of the Corporation, which may, so far as such duty of presentation is concerned, repeal such statutes, orders, or rules at any time, if such repeal be warranted by any exigency demanding it for the welfare of the College.

With regard to statutes, rules, orders, and by-laws, which, by the Charter, are required to be submitted to the Overseers, and which have been so submitted and approved, and do not suppress, restrain, or limit the exercise of the exclusive powers vested in the Corporation by the Charter, your Committee are of opinion that they are irrevocable but by the consent of both Boards. But

in regard to any, whereby the Corporation should undertake absolutely to divest itself of any power or authority, the duty of exercising which is by the Charter imposed exclusively upon it, or to submit its exercise to the control or will of any other person or body, your Committee are clearly of opinion, that it would be an unwarrantable dereliction of its duty and a breach of the trust confided to it.

The relative rights, powers, and duties of the two Boards must be found in their Charters. When accepted, these constituted a binding contract between the government and the College, and all who have been, or shall become, its benefactors in donations for its benefit, and upon the faith of which all its estates were acquired and are held; and the various powers thus vested in each department are held upon the same solemn trusts, and can no more be parted with by either, or delegated to others, than can the possession and administration of those estates. The Corporation has no more legal or justifiable excuse for surrendering the powers thus derived, or for acquiescing in any limitation of them, than the Overseers have for usurping them, or for parting with their own. Nor can the two Boards unitedly vary their legal relations to each other, or take from or vest in either any trust, power, or responsibility not by the Charter authorized to be so taken or vested.

At the same time, however, the Overseers are the constituted advisers of the Corporation, to whom they have the right to apply for counsel and aid in all cases of magnitude, and among which appointments to important offices may be justly ranked. The whole history of the College shows with what a willing disposition the Corporation has availed itself of this privilege; and acquiesced in the determination of all questions thus submitted. And it is to be hoped that this reliance may never be weakened, and its manifestations never diminished.

These cases, therefore, in the opinion of your Committee, are properly to be considered as those of voluntary submission by the Corporation of appointments to the Over-

seers for their counsel and advice;—it being within the chartered right of the one to ask, and part of the corresponding obligation of the other to give, when asked, such counsel and advice, and also as lawful and as proper to establish a continuing general rule for the asking of such advice in each case, or class of cases, as it would be to make each a subject of particular enactment. But no such rule could be of legal obligation to control the Corporation in the exercise of its exclusive right of appointment, or to prevent the repeal of the rule, if circumstances should arise which, in the exercise of an honest judgment and sound discretion, should render it the duty of the Corporation to withhold such presentation.

After this full exposition of their views of the respective legal rights and duties of the two Boards upon this most delicate and important subject, your Committee are unwilling to leave it without a full and frank statement of their convictions, in which they doubt not to have the concurrence of every member of this Board, that the practice which has hitherto prevailed of such submission to the Overseers of all appointments to offices of government and instruction is one founded in the wisest policy, and should be adhered to so long as it may be with any just sense of duty or self-respect on the part of the Corporation. It not only has the sanction of antiquity coeval with the chartered existence of the College, but is of great moment as a safeguard against appointments from interested or private motives; and invests the officers thus confirmed with a sense of public responsibility, and with dignity and authority of great value in establishing effective influence over the scholars and in elevating the character of the institution. No case, therefore, of a mere sense of injustice on the part of the Overseers towards the Corporation, in reference to the motives or views of its members in making an appointment; nor any mere diversity of opinion upon the qualifications of the candidate, however clear may be their conviction of their superior means of judgment; nor any belief of mis-

apprehension and error only in his rejection,—nothing, indeed, falling short of an inevitable conviction on the part of the Corporation of oppression, and of permanent injury to the College, or to their constitutional authority under the Charter,—should ever induce a departure from it.

In connection with this subject of appointments, the Committee were pleased to make the following remarks: “It has been a frequent practice, when a new professorship or other office is established by the Corporation, for them to send a record of their action on the subject to this Board, and at the same time present a vote appointing on their part some person to fill the office. *This is deemed by the Committee an irregularity*, and may be a source of much embarrassment and difficulty. *The Committee therefore trust* the Corporation will not hereafter proceed to an election to fill an office till its establishment has received the approval of this Board.” (Rep. p. 14.) It is not added, that any appointment thus sent up was ever objected to on that account, nor could it be so said, with the exception of the case of the Plummer Professorship in 1855, when a like objection was suggested.

Upon reference, however, to the history of the College, it will be found that this has not only been a frequent practice, as the Committee admit, but that it has obtained in a majority of cases ever since the establishment of the College, beginning with the first three professorships; and that the Board of Overseers, by the vote of February 13, 1834, above referred to, recognize it as a proper mode of procedure. If, therefore, it be an irregularity, which seems impossible under these circumstances, it is one for which both Boards seem equally accountable.

It is obvious that no rule can be prescribed by the Overseers to regulate the proceedings of the Corporation upon this or any other subject, whether in the form of an order or by-law, or by the expression of any general opinion. The Corporation, in presenting appointments for confirmation, must exercise their own judgment and discretion as

to the most suitable time and manner; but will of course be always disposed to adopt those which the emergency and due respect for the convenience and pleasure of the Board of Overseers may seem to require. And if, in any instance, the time should seem to the latter not well chosen, or the manner liable to objection, or as tending to embarrassment, they have the power to withhold or defer their consent; and no imputation of irregularity can with propriety be said to rest upon either Board, in such exercise of its power according to its sense of duty.

SALARIES.

The next subject presented, for consideration is that of salaries, and one to which the Committee of the Overseers seem to have attached peculiar interest and importance, as it occupies eleven out of the twenty-seven pages of their Report, and appears to have been the occasion of the most elaborate of their efforts in the way of historical development.

Your Committee concur in this opinion of its importance; for if there be one subject more than any other which they think should be especially and exclusively confided to a body of men so small, and therefore standing so prominently before the public, in the guardianship of one of its greatest and most important institutions, as to make each as it were individually and alone responsible for its doings; and holding their office permanently and independently of popular election; by habits and pursuit in life accustomed to the administration of affairs; and by residence and familiar acquaintance with persons and employments in the College, and by the duty of unceasing supervision over all its concerns having every opportunity of acquiring accurate knowledge of the peculiar fitness of the compensation for the service performed, and of the competency of the funds for the occasion, — that subject is salaries. And more es-

pecially does this appear to them to be so, in the remembrance that a very large portion of those which they have to determine are derived from donations given as their peculiar sources, and for the faithful appropriation of which the Corporation is alone legally responsible. It seems to your Committee that it would be an anomaly no less in wisdom and equity than in jurisprudence, to subject those who are alone legally answerable for the due appropriation of funds to the absolute control of those who are under no legal liability whatever concerning them.

The learned Committee not only appear to have been elaborate in their researches, but have sought to strengthen their position by the most unqualified and confident assertion of the unquestionable character of their claims; so that if the matter in hand were to be thus decided, it is settled beyond possibility of appeal. Thus, after some preceding statements, to be presently examined, assuming as unquestionable their claims of confirmation or supervision as essential to the validity of the grant of any salary, they say (Rep. pp. 16, 17): "But it may be regarded as A MATTER FREE FROM ALL DOUBT, that if no clause of said Act [the Appendix] applies to salaries, *then all votes or orders on that subject* REQUIRE THE CONFIRMATION OF THE OVERSEERS, AS IT IS PROVIDED IN THE CHARTER; but if any provision of said Supplementary Act does embrace votes or orders respecting salaries, (which is understood to be the opinion of some members of the legal profession,) then as to all such votes or orders *the Overseers* CLEARLY HAVE THE RIGHT OF REVISION." Again (p. 17): "Notwithstanding the confidence of the Committee in the doctrine above stated, YET, AS THEY ARE DESIROUS OF AVOIDING EVERY POSSIBILITY OF MISTAKE IN SUCH A CASE, *and as some persons* MAY HAVE DOUBTS WHICH IT IS DESIRABLE SHOULD BE REMOVED, the Committee have examined the records of the Overseers since the year 1707," &c., &c.

It may seem highly presumptuous in your Committee to express any distrust of the accuracy of conclusions thus

confidently stated. But still, as they not only have such distrust, but as a like course of investigation has led to an entirely opposite result in their own minds, and one at least of honest and deeply settled conviction, if not entertained or to be avowed with equal confidence, they trust for indulgence in a somewhat careful and extended exposition of the grounds of their belief.

And here again they deem it subject of no slight gratification and importance, that the learned Committee of the Overseers have not only clearly and fully stated the ground of their claims, but have also carefully and elaborately set forth their argument and historical reliances, so that the whole field of their exploration may be traversed, and the fruits of their researches justly weighed and measured. Encouragement as to the future, it is also hoped, may be derived from the consideration of the eminent ability and thoroughness with which they have conducted this branch of the investigation. The field of inquiry and argument, at least on their side, may be considered as exhausted, and the agitating questions calling for such efforts are now in the way to be finally put at rest, on whichever side the truth shall be found.

The Committee commence their argument (Rep. p. 15) with this statement: — “It is provided in the Charter, in substance, as appears in the passage hereinabove cited, that the Corporation may meet and make such allowances to the College officers and servants as they shall think fit; *provided*, their orders or doings on the subject shall be allowed by the Overseers. This provision is contained in the very section or part of the Act in which the matter of appointments is regulated, and that too by the same phraseology as is used touching salaries; and it has never been questioned by the Corporation, that all such appointments or elections require the confirmation of the Overseers.” The “passage hereinabove cited,” thus referred to, is the third clause in the Charter, cited on the fifth page of their Report, and also above (pp. 17, 18). The statement

they here give of that clause seems distinctly to represent, that the proviso in it contains the words "or doings" as well as the word "orders," and would naturally be understood to imply that the clause related only to appointments to office and allowances to officers and servants. But the slightest reference to it will show that no such words as "or doings" are there to be found; and that it embraces other subjects than appointments and allowances, to which the proviso certainly may exclusively relate. It must therefore be presumed, that the introduction of these words "or doings" must have been intended to be used as explanatory of the word "orders," or as synonymous with it.

Before proceeding to examine the position thus taken, your Committee desire to enter their respectful but earnest protest against the manner in which the proviso in that third clause is uniformly described, in every instance in which it is referred to in the Report; for however honestly expressive of its sense as entertained by the Committee of the Overseers, it is, to say the least, an arbitrary assumption of its meaning, and one which your Committee believe they have proved to be erroneous; and which certainly is calculated to mislead those who may rely upon these statements, instead of examining the Charter for themselves.

That proviso is in these simple words: "*provided the said orders be allowed by the Overseers.*" And the chief questions now in issue depend entirely upon the meaning of that word "orders" as there used;—the Committee of the Overseers assuming that it extends to appointments and salaries, while your Committee believe they have demonstrated that it should be confined to statutes, rules, and by-laws. To give to it, therefore, either meaning by descriptive adjuncts, or to attach to it assumed synonymes, when referring to it as a basis of argument, is not only to beg the whole question in controversy, but necessarily to mislead those who may rely upon such expressions as an ac-

curate account of it. Your Committee cannot but attach importance to this feature in the Report, since they can bear testimony to the great impression made upon their own minds, and upon those of others, on its first perusal, by this mode of referring to that proviso, no question then arising that this manner of citation afforded an accurate description of it.

The first attempt thus to enlarge the meaning of the word "orders," or rather to give an entirely new meaning to it, is found on page 8, where the Committee, in undertaking to recite the proviso at the close of the first clause of the Appendix, — and which is in these words: "Provided also that the Corporation shall be responsible unto, and *those orders and by-laws* shall be alterable by, the Overseers according to their discretion," — *substitute* the words "*votes or doings*" for *orders and by-laws*, as if they were precisely synonymous. The next occurs on page 9, where the word "*votes*" is used in conjunction, and as meaning the same, with "orders." The next is on page 14, where appointments to office are represented as "orders." And another on page 15, where, in undertaking to quote the third clause, they attach the words "or doings" to the word "orders," as being synonymous with it, for the purpose of making it appear clearly to extend to appointments and salaries. Again, on pages 16 and 17, the word "*votes*" is repeatedly attached to the word "orders," or the latter to the former, as if they were synonymous terms, and so to be considered in construing the Charter. ✓

Your Committee believe that any such use of the word "orders" is not only entirely unauthorized by the obvious meaning of it in the proviso under consideration, and opposed to the whole context of the Charter, but also to all use of that word in the early records of both Boards; it being, as they believe, uniformly used to designate statutes, rules, or by-laws, and never as describing appointments to office, establishment of salaries, and the like. But whether

this be so or not, it is manifest that to assume, throughout the discussion, that it contains, and constantly to describe it as containing, a meaning the truth of which is the sole subject of argument, can have no tendency to throw light on that argument, nay, can hardly fail to prejudice the inquirer, however honest, entire, or enlightened may be the conviction. that leads to such assumption.

It is then wholly upon this third clause, and the proviso at the close of it thus construed, that the Committee of the Overseers rest the claims of that Board to supervise and control the establishment of all salaries of College officers or servants. They indeed state (Rep. p. 16) that, in the opinion of some members of the legal profession, the Appendix has some application to the subject ; but they do not represent it to be so in their own, nor give to that instrument, if it does apply, any greater efficacy than to substitute a right of revision for that of confirmation, required, as they say, by the Charter of 1650,—making that the whole basis of their present claim.

Your Committee have above stated their views concerning this clause and proviso, when considering the legal construction of the Charter, and their bearings upon the subject of appointments ; and have nothing to add further, except to repeat, that, upon the clear and unambiguous meaning of that clause and proviso, as they read them, and upon the historical evidence which they have already above adduced of the uniform practice of both Boards under them, and the recorded full expression by both of their interpretation of them, that proviso has no reference whatsoever to the establishment of any salary made under authority of the clause to which it is attached. On this subject they have only to refer to their views as above stated (pp. 21–23, and 61–70), and to the evidence there offered of the entire mistake under which the Committee of the Overseers were laboring when they asserted that “it has never been questioned by the Corporation, that all such appointments or elections require the confirmation of the Overseers.” (Rep. p. 15.)

But this Committee go much further, and, assuming thus erroneously that such had always been the unquestioned construction of this clause by the Corporation, and desiring to account for a practice not in unison with it, they go on to say: "But the Corporation has, on some occasions, particularly during a considerable period immediately preceding the year 1761, pursued a course which indicated that *in their opinion they could, by virtue of the said Appendix to the Charter*, prescribe salaries for the College servants by votes or orders, which went into operation without the confirmation of the same by the Overseers." (Rep. pp. 15, 16.)

What particular means the Committee have had of ascertaining the opinions of members of the Corporation upon that subject before the year 1761, or on what basis of reasoning or analysis they arrive at the conclusion, that its members were influenced in the course they pursued concerning salaries by any such construction of the Appendix, your Committee are utterly ignorant; but they must be allowed to express their entire disbelief in the correctness of any such inference from anything known to them. Moreover, as the same course has been pursued by the Corporation for the past forty years or more, they may be permitted to add, that, so far as they know the views of their predecessors, and so far as they know their own, they have never heard of or entertained any such opinion as the reason for pursuing that course, but have ever followed it in full belief that it is that which the Charter itself prescribes.

These preliminary matters being disposed of, which seemed to demand consideration from the manner in which they are introduced into the Report, and the eminent authority thus apparently given to them, your Committee proceed to the examination of the historical evidence adduced by the Committee for the purpose "*of avoiding every possibility of mistake in such a case,*" and removing any doubts which any persons may have, concerning the right which they thus claim.

Your Committee, however, cannot think, that, if historical evidence is to be resorted to, the examination should commence with the year 1707, the time selected by the Committee in their Report,—being a period of fifty-seven years after the date of the Charter; or that the records of the Overseers are the only evidence to be adduced upon such a subject, as they seem to believe. They say (Rep. p. 17), that they “have no means of knowing what the practice was from 1657, the time of the enactment of the Appendix, to the year 1707; and nothing appears on the subject in the records of the Overseers till about 1722”;—yet it would seem (Rep. p. 6) that the Committee must have had means of familiar knowledge of the proceedings of both Boards in the interval between the granting of the Charter in 1650 and of the Appendix in 1657. At any rate, there are sources of information which were open to them, and, as they admit, freely at their command, in the records of the Corporation, and also in those of the General Court, which, as your Committee believe, throw much light upon the subject, and may perhaps lead to a different and a better apprehension of the later events above noticed by the Committee of the Overseers. The latter seem indeed utterly to ignore all that took place before 1722, a period of seventy-two years from the granting of the Charter; and they also virtually dispose in the same manner of the subsequent thirty-eight years, dismissing them with the passing notice, that “the right of the Overseers to revise the votes of the Corporation as to salaries, was at divers times in the course of them agitated”; that in a few instances the votes of the Corporation making allowances to instructors were presented to the Overseers, and that at several times calls were made on the Corporation for such votes, in which case they were “always promptly” presented (Rep. p. 18);—thus leaving the inference, that there were few if any instances in which the Corporation had appointed salaries *without submitting them to the Overseers for confirmation.*

It would seem reasonable to expect that the proceedings of the two Boards upon any subject, involving their relative constitutional rights and obligations, for the first period of one hundred and eleven years after their establishment, would be particularly instructive as regards their mutual understanding, and the legal nature, of those rights and obligations. Accordingly, this entire omission of any reference to their number or nature would naturally lead one to suppose that very few or none had ever taken place; or that all which had taken place were so unimportant as to be entitled to no consideration in such an investigation.

It is very true that the acts of the Boards illustrative of this subject were, in the early history of the College, fewer than they otherwise would have been, by reason of its dependence upon the General Court for pecuniary aid, and of the disposition of that body to place the distribution of its grants in the hands of the Overseers, as above stated. But even in the earliest times, there were many, and of more emphatic significance in this inquiry, in consideration of the irresistible power of that Board during those times, and of the corresponding extreme improbability that the Corporation would venture upon the assumption or exercise of any questionable right or authority. And in later periods, prior to 1761, they were of a frequency and importance which render this omission of reference to them wholly unaccountable in the minds of your Committee, otherwise than by supposing that the learned Committee of the Overseers, adopting the interpretation given by them to the proceedings of that year as unquestionably true, considered them as so conclusive upon the whole matter as to render all preceding investigations superfluous. But your Committee, entertaining a totally different view of those proceedings, and believing that a knowledge of the antecedent history of the two Boards on this topic is essential to a correct decision of the questions in hand, beg leave to present it for consideration.

From the year 1650, the date of the Charter, until the

year 1657, the date of the Appendix, there is nothing known to your Committee, upon the records of either Board, bearing upon the question. Were it not for the evidence which the learned Committee seem to have had, but which is not disclosed, that the College was acting under its Charter during that period, and that it was owing to great delay and inconvenience incurred in the managing of its affairs under the provisions of that statute that the Appendix was granted (Rep. p. 6), your Committee would have inclined to the belief, that no organization of the Board took place until the enactment of the Appendix, in 1657.

But assuming the position taken in the Report to be correct, the first proceeding which may be supposed to throw light upon the subject under discussion was an act passed by the General Court, in September, 1653, appointing a committee of inquiry into the affairs of the College, consisting of some of its own members and some of the Overseers. It appears that, "on perusal of the return of the committee, the General Court judged that all the College funds should be committed to the care and trust of the Overseers," — "*the several* yearly allowances of the said President and Fellows to be proportioned as the said Overseers shall determine concerning the same." This procedure was for the purpose of forcing the resignation, or effecting the removal, of the worthy and devoted first President, whose services and sacrifices for the College will ever be held in grateful remembrance by its Alumni, however appreciated by his contemporaries. He had made himself obnoxious to the distrust and ill-will of the ruling powers by a departure from their faith upon the subject of infant baptism. The motives and nature of the procedure, and the constitutionality of it, if the Corporation then had an organized existence, are not matters for comment here. But it is evidence tending to show, that up to that time the funds had been in the hands of the Corporation, if organized; and that the Overseers had not, by virtue of their office, any control over the apportionment of the several

yearly allowances of the President and Fellows, and that their consent had not been esteemed necessary for their validity. And this inference is much strengthened by a letter of the venerable President, written soon afterwards on resigning his office, in which he touchingly complains of the proceedings of the General Court, as being destructive of *the former laws and orders under which the College had been managed.*

By that act, it will be perceived that its funds were placed in the hands of the Overseers. In 1654 an annual grant was made of one hundred pounds out of "the County rate to the College," *to be distributed "between the President and Fellows, according to the determination of the Overseers of the College."* No doubt can exist of the right of the General Court thus to regulate the distribution of its own bounty. But it is obvious that no such precaution could be thought needful, if the consent of the Overseers was, by force of the Charter, indispensable to the validity of any such distribution. This grant was continued for many years subsequently to 1657, the date of the Appendix. In 1669 a donation was made by inhabitants of Portsmouth, enabling that town to pledge the payment of £ 60 a year for seven years ensuing, "*to be improved by the Overseers of the College for the advancement of good literature there.*" Other donations, it is also believed, were given in like manner. And we find, accordingly, that the Overseers, thus having the chief funds at their disposal, frequently made appropriations of allowances to Fellows, and students, and inferior officers, without any action of the Corporation upon them. In September, 1670, the Corporation voted "to speak to" the Overseers for the enlarging of the Butler's stipend.

In February, 1673, they voted that *an account of the salaries of two of the Fellows* (no doubt instructors) *be presented to the Overseers*, that "further establishment may be made for the encouragement of the Fellows." If the consent of the Overseers had been considered necessary, it

must have been given when those salaries were established ; and no account of them, therefore, could have been needed for the purpose stated.

In January, 1673, the Overseers voted to pay Dr. Leonard Hoar £ 100 towards his transportation to this country. These votes sufficiently show that during that period the Overseers had funds under their control, and which they appropriated, entirely independently of any possession or agency on the part of the Corporation. At the same time, however, it appears that the Corporation had the exclusive appropriation and control of the moneys held by the College in its own right, and the distribution of which had not been placed by the donors in the hands of the Overseers ; and appropriated them to payment of salaries, without any submission of such allowances to the Overseers, or any attempt on their part to interfere with them.

Such appointments of salaries were made in July and October, 1679 ; in April, 1682 ; in December, 1683 ; in October, 1684 ; in July and September, 1685 ; and at several other times before 1685 the Corporation had made grants or allowances to some of the Fellows for services. But no such appointment, grant, or allowance appears ever to have been submitted to the Overseers, or acted upon by them ; although throughout this same period the elections of Fellows and all by-laws were duly so submitted, and are stated so to have been upon the records of the Corporation ; — leaving no room for doubt, that, if the appointments, grants, and allowances had been thus submitted, that fact would also have been in like manner recorded.

From the year 1685 to the year 1722, *a period of thirty-seven years, the Corporation annually granted salaries to College officers, and in no instance was one such grant submitted to the Overseers.*

It is, therefore, established beyond dispute, if your Committee are correct in their belief and statement of these facts, that, for the first seventy-two years after the granting of the Charter, — during which time numerous instances

occurred of grants of salaries by the Corporation to all the officers of the College, and for half of which time such grants were made annually, — not an instance can be found of the submission of any one to the Overseers for their confirmation or rejection, or of any claim made by them of right to have them thus submitted. And when it is considered that during all this period the Board of Overseers was composed of some of the most powerful and prominent men in the Colony, and that acts of severity, if not of oppression, on their part, and on the part of the General Court, towards the Corporation, as a comparatively very humble body, had been occasionally committed, your Committee are at a loss to imagine proof more entire and satisfactory of the true construction of the Charters on this subject, so far as the understanding and intentions of the framers of them, and of their immediate successors, and their practice under them, can be accounted legitimate evidence of sound interpretation. Nor can they comprehend how it was that the Committee of the Overseers had “no means of knowing what the practice was from 1657, the time of the enactment of the Appendix, to the year 1707.” (Rep. p. 17.)

Having thus, as your Committee think, shown a clear, uniform, and established practice, down to the year 1722, wholly adverse to the claim now made by the Overseers, they come to the period when the question was first raised of their power over salaries; though the one then agitated was not, as the Committee of the Overseers seem to think, the same as that now in discussion, — of a general power over salaries, — but one of a limited and especial nature.

The nature of that procedure has been necessarily anticipated above, in treating of the subject of appointments (pp. 62–64). It was an effort on the part of enemies of the Corporation in the Board of Overseers to drive from office the President and three of the Fellows, who were obnoxious to their displeasure from the party differences and jealousies of those times. And the mode adopted was by

procuring three resolutions to be adopted by the General Court; one declaratory of the intent of the Charter, as requiring that the officers of government and instruction should be the Fellows of the Corporation, not exceeding five in number; the second, "that none of said Fellows be Overseers"; and the third, that "the President and Fellows of the said College, or the major part of them, are not warranted to fix or establish any salary or allowance *for their service, without the approbation and consent of the Overseers.*" The first, if prevailing, would have removed all the obnoxious Fellows, they not being instructors; and the third would have placed it in the power of the Overseers to remove the President at will, by giving them the entire power of withholding any salary from him, or allowing such only, and on such terms, as should render it impossible or derogatory for him to retain his office. Such power over the establishment of salaries would, in truth, give absolute authority over all the officers of the Corporation and of the College receiving salaries for their services.

As above shown (p. 63), no pretence was then made of any right on the part of the Overseers to interfere with or control the establishment of the salaries of any officers or servants appointed by the Corporation *under the third clause of the Charter*; but only of those in its own Board. This movement, therefore, made at that time, and with such motives, and under such circumstances, not only affords, as your Committee believe, the strongest possible evidence that no such pretence was then entertained by the Overseers, but is also to be regarded as a distinct admission that the claim now made, of general power of supervision and control over salaries, under that clause, is entirely without any just foundation.

If the resolves had been concurred in by the Governor and Council, they obviously could have been of no legal validity, as the exposition of the intent and meaning of charters belongs not to the legislative or executive, but to the judicial department of the government. Those re-

solves, being non-concurred in by the Council, after a hearing granted to the Corporation which had been denied by the House, were never afterwards heard of; and the Corporation went on, as before, annually voting the salaries of College officers, without submitting these votes to the Overseers, or any pretence of claim on their part to have them so submitted, until the year 1732, — another period of ten years. In the mean time, in December, 1722, the Overseers *recommended* to the Corporation that they should make a gratuity to Mr. Flynt (a tutor) for his past services as clerk of the Overseers, and settle a salary upon him for the future; and a vote was accordingly passed and concurred in by their Board.

In June, 1722 and 1723, votes of the Corporation appointing Mr. Judah Monis an Instructor in Hebrew, with a salary of eighty pounds, were sent up for concurrence, and approved. In a few instances the Overseers *recommended* to the Corporation to increase the salaries of certain officers. This was done in 1723, on the memorial of Tutors Sever and Welsted; in June, 1724, in the case of Professor Wigglesworth; and in September, 1725, concerning all the tutors' salaries. In these cases no votes had been sent up by the Corporation, nor did the Overseers assume that their consent was necessary to the validity of any grants, but simply advised or recommended the augmentations which they thought advisable. And they are mentioned, not as affording instances of any admission by the Corporation, or any assumption by the Overseers, of any such right as that now claimed, — for they plainly are not such, — but to show that they have not been overlooked.

In 1732, the next agitation, if it may be so considered, of any question on this subject took place, when, as above related (pp. 64, 65), an inquiry being instituted by the Overseers into the condition of the College, a committee reported, among other proposals, "that, whereas heretofore, under the Charter, salaries were wont to have the allowance of the Overseers," they should "assume their right of

stating and allowing salaries *according to the ancient practice*"; which being amended by the Board by substituting the words "consenting to" for "stating," was sent down to the Corporation, and was never afterwards heard of or alluded to in either Board, so far as the records show. It is evident that the committee had been misled into the belief that the Overseers possessed the *original power* in their own right, under the Charter, of *stating or allowing salaries*, by the fact that during the early periods of the College history they had exercised unlimited authority in establishing salaries, and in making such allowances, out of the funds given to them or placed under their control by the General Court and other benefactors, as has been above shown;— for it will hardly be pretended that any practice had ever existed of their undertaking so to distribute or to control the distribution of any funds held by the Corporation in its own right, and not made by the donors expressly subject to appointment by the Overseers. The utter silence ever after prevailing in both Boards concerning this proposal,— after the subject had been thus deliberately and prominently presented for consideration and investigation under such peculiar circumstances, affords, as has been before suggested (pp. 64, 65), very strong evidence that the Overseers had then become satisfied to abandon all claims to the supervision and control over salaries appointed by the Corporation, as untenable.

From that time to 1761, a period of twenty-nine years, no further question appears to have been entertained of the absolute and exclusive right of the Corporation over the establishment of salaries. That Board continued to appoint them in all cases, and not an instance is to be found, on the records of either Board, of the submission of any one of them to the Overseers for concurrence. And this statement, completing the history of the subject for the first hundred and ten years from the foundation of the College, as a chartered institution,— a period embracing more than one half of its existence, but which the learned

Committee of the Overseers have seen fit to pass with only the incidental and casual notice above mentioned,— seems to your Committee of great moment in determining the constitutional relations of the two Boards in the matter under consideration.

It proves that the Corporation, during the lives of the framers of the Charter, and of their successors, for a period of a hundred and eleven years,— who may well be supposed to have the best knowledge of the intent of its provisions, and under circumstances the most adverse conceivable to any usurpation or unwarrantable exercise of authority by the Corporation, and notwithstanding zealous efforts to deprive them of it by opponents among the ablest and most influential men of their times in Church and State, exercised the exclusive power of appointing the salaries of all College officers, excepting in instances where such power of appointment was expressly vested in the Board of Overseers by the donors of the funds out of which they were to be paid. Taken by itself, this would certainly justify, if it did not render irresistible, the conclusion, that the power under consideration originally and rightfully belonged to the Corporation,— a conclusion deriving additional force from the consideration that the question had been twice agitated; in one instance, pressed with great earnestness by zealous, able, and most powerful opponents, intent upon breaking down that Board by the operation of it,— though claiming less power than that now asserted by their successors,— and ultimately abandoned after a severe conflict; and in the other, where the same general power was claimed as now, apparently withdrawn as soon as investigated.

With this reasonable presumption, therefore, in favor of the position that this exclusive right is vested in the Corporation, founded as is believed upon the clear and express provision of the Charter in the third clause, and the usage of the two Boards for more than a century, your Committee proceed to examine the historical evidence com-

mencing at the expiration of that long period, adduced by the learned Committee of the Overseers in denial of this right, and in defence of their claim of supervision and control, — evidence which they appear to deem so conclusive.

They introduce it by remarking, that, from the year 1722 to 1760, "the right of the Overseers to revise the votes of the Corporation, as to salaries, was at divers times agitated; and in a few instances the Corporation presented to the Overseers their votes by which allowances were made to instructors, for their approval, and at several times a call was made on the Corporation by the Overseers to send to the latter Board their votes in relation to salaries and other subjects, which call was always promptly complied with on the part of the Corporation, and their votes were duly presented. *This important point being fully settled, and the difficulty as to obtaining possession of the votes of the Corporation being removed,* the Overseers took up the subject of salaries in earnest, and adopted the following vote." (Rep. p. 18.)

This passage, as do some others which your Committee regret to notice in the Report, — taken in connection with the statement (Rep. pp. 8, 9) that the Corporation, in consequence of acquiring power by the Appendix to enact by-laws which should become operative before confirmation by the Overseers, "*kept close upon their books most of their doings,* whereby it sometimes happened that important votes or orders were unknown to the Overseers for years," — seems designed to produce an impression unfavorable to the character of the Corporation for candor and propriety of conduct, in reference to their votes requiring presentation to that Board; which, so far as your Committee have been able to ascertain, is not justified by any event in the history of the College. Nor have they been furnished with evidence of any by the Committee of the Overseers, although a respectful request in writing was made to their chairman for information touching this charge; to which a verbal reply was given, repre-

senting that he was unable to find the memoranda made by him of the particular instances referred to, indicating, as was thought, a disposition to forego such communications, and that he did not intend the imputation of any deliberate wrong in the remarks made in the Report upon this subject.

Neither are your Committee able to understand what was the "important point" thus "fully settled," nor the "difficulty as to obtaining possession of the votes of the Corporation" thus "removed." If the important point referred to were that of the right of the Overseers to revise salaries, with its acknowledgment by the Corporation, there would not seem to have been any occasion for again taking "up the subject in earnest." Or if the "point" and "difficulty" related to the obtaining knowledge of the proceedings of the Corporation, it is very clear, upon their own confession, that none had existed; for they expressly say, that during that whole period, from 1722 to 1760, the call of the Overseers for "votes in relation to salaries and other subjects" *"was always promptly complied with on the part of the Corporation, and their votes were duly presented."*

In order to any just apprehension of the value of the evidence adduced by the Committee in their Report, now to be examined, the position for which they claim its support, and the soundness of which they assert to be proved by it "beyond possibility of mistake," must be constantly and clearly borne in mind. It is, that a right is vested in the Overseers to revise and control all appointments of salaries, by virtue of authority given to them by the proviso making part of the third clause of the Charter; which clause they represent as the source of all power in the Corporation to elect to any office except to their own Board, or to establish any salary. That clause, as has been seen, is expressly and alone quoted as the source of all such power in the Corporation, and all such right of the Overseers. (Rep. p. 15.)

The Committee state the evidence thus:— That, at a

meeting of the Overseers, November 20, 1760, it was "Voted, that there be a committee to consider whether it is in the power of the Corporation to make allowance to those who are employed in the government or instruction of the College, without the consent of the Overseers." That "on the 11th of June, 1761, this committee made a report, which was read, and the 9th of July then next was specially assigned for its consideration; and it was voted that the Corporation be served with a copy thereof." That "on the 26th of the same month of June, the Corporation met and passed the following vote, viz.: Voted, that whatsoever salaries or grants shall be hereafter made to any of *those who are in the Government of the College*, shall be laid before the Overseers for their consent, and that this vote be presented to them for their approbation." That on the 9th of the following July this vote of the Corporation was laid before the Overseers, and "was read and consented to, 'it appearing,' as the record states, 'to this Board [the Overseers] to be agreeable to the College Charter.'" (Rep. p. 19.) And the Committee observe: "By this action of the Corporation, they clearly gave up the great question in controversy, and in fact seem to have admitted it to be essential to the validity of their votes or orders respecting salaries and allowances, that the same should receive the consent of the Overseers." Such a conclusion, from such premises, seems to your Committee somewhat marvellous.

The Committee further set forth certain votes of the Corporation, passed in the ensuing month of September, establishing the salaries of two professors, four tutors, and the Instructor in Hebrew, of the Treasurer, and of the clerk of the Overseers. No mention is made of those of the Steward, Librarian, or any other officers or servants.

It will be observed that the vote of the Overseers of the 20th of November, 1760, appointing the committee, directed them to consider whether it was in the power of the Corporation to make allowance to those who were em-

ployed in the *government or instruction of the College*. The only further proceeding of the Overseers upon the subject, before the passing of the vote of the Corporation, was a vote to have a *copy of the report of its committee served upon that Board*; and there is nothing to indicate that the Corporation had any other act of the Overseers before them than that report, when they passed their vote.

The conclusion, therefore, is inevitable, that the claim thus made by the Overseers was intended by them, and understood by the Corporation, to be rested upon the ground taken in that report, and cannot be considered as having been more extensive than is therein stated; and must have been exclusive of any other claim therein repudiated. That report, therefore, is the only authority for the exact nature of the claim, and the grounds upon which it was based, and also for a just explanation of the vote of the Corporation, so far as it may need any. Fortunately that report is still in existence in the College archives, together with the reply to it by the Corporation; both were also in the hands of the chairman of the Committee who made the Report under consideration, and copies of both are hereto annexed, as before mentioned, marked Appendix, No. IV. and Appendix, No. V.

No allusion is made to the contents of that report by the present Committee of the Overseers; on perusal, however, it is perfectly manifest that the Overseers then made no such claim as is now advanced by them, but one much more limited, *confining it solely to the salaries of officers of the Government*, not extending it even to those of officers of instruction who were not at the same time members of the Government, — much less to others. Again, it appears that they not only did not rest their claim upon this third clause, but based it wholly upon the fifth clause, *expressly pointing out the third as one which applied to salaries of such officers and servants only as the Corporation had the exclusive right under it to appoint independently of the Overseers*, and therefore as being inapplicable to salaries of officers of the

Government, which were "to be chosen with the consent of the Overseers"; and thus in the strongest possible manner not only admitting, but declaring, that *the power of the Corporation to appoint officers and allow salaries under that third clause is absolute, and uncontrollable by the Overseers.*

It is worthy of especial notice, that while the vote of the Overseers appointing the committee required them to consider and report upon the question, whether the Corporation could make allowance to those employed in the government or instruction of the College without their consent, the committee in making their report are wholly silent about the salaries of those employed in instruction *only, and confine their argument wholly and only to those of members of the College Government, to whose appointment their consent was necessary.* And as the committee rested their claim wholly upon the Charter, and by it no other appointments than those of members of the Corporation are made subject to such consent,—the Overseers themselves admitting, in that same report, that they had no control over those made under the third clause, and there being no other provision in the Charter that touches that subject,—the conclusion is irresistible, upon the construction of the Charter, that their claim must be confined to the right of control over salaries of members of the Corporation. And such indeed seems to be the whole scope of their argument, which was based upon the fifth clause, assuming that it gave them control over the disposing by the Corporation of the revenues of the College, "for the better ordering of *the government* of said College and Corporation," and that this necessarily involved the disposing of the "revenues to the support and encouragement of *those concerned in the government* of the College; for without such a disposition, the *government* of the College could not be well ordered, nor indeed subsist at all."* And in confirmation of their views they cite the resolve of the General Court in 1722,

* See Appendix, No. IV.

above considered, which is in terms expressly confined to salaries or allowances for services of members of the Corporation (p. 96). Again, they rely upon the principle that it is contrary to the usage of all well-regulated societies to "*permit their officers to settle the question of their own salaries, and then pay themselves out of the common treasury*";—an argument which, it is plain, could be applicable only to salaries of members of the Corporation. Moreover, upon reference to the records, it will be found that at that time five out of the seven members of the Corporation were drawing salaries from the College treasury, thus presenting a case clearly within the scope of their argument.

And the vote of the Corporation, so much relied upon, was in exact correspondence with the Report, expressly confining the proposed submission to the Overseers of salaries or grants to such as should thereafter be "*made to any of those who are in the Government of the College.*"

If, therefore, it were admitted that these proceedings and this vote could be considered as giving up any question in controversy, or as admitting any right of the Overseers under the Charter to exercise any control over any salary,—which, however, your Committee maintain to be a palpable mistake,—it is plain, that, so far from supporting the present claim of the Overseers, or constituting any ground upon which it can rest, they annihilate both, and prove not only that the Overseers never claimed, and that the Corporation never admitted, any such general right of revision or control over salaries, and that this third clause was never referred to as the basis of any such claim, but that both such claim, and such ground of any, were expressly repudiated.

Nor is this all; for, as your Committee confidently submit, these proceedings and this vote of the Corporation, instead of being accounted any admission of any right of the Overseers under the Charter, even over the salaries of the officers named in the vote, are to be accounted very strong,

if not decisive, evidence against any such admission, and that the Corporation thus carefully repudiated any. It is to be borne in mind, that although the Overseers, by thus voting to send down a copy of that report, must be presumed to have adopted the views it contained for the occasion, yet no official vote accepting the report, or declaratory of the views advanced therein, was passed and entered upon their records, or sent down to the Corporation, by which the assertion of them was made permanent,—the report itself not being recorded. And on the other hand, no vote of the Corporation whatever expressly referring to that report is to be found upon their records, by which their acquiescence in its principles or conclusions can be inferred. On the contrary, an elaborate, and, as your Committee think, perfectly successful reply was immediately made to it, and placed on file with it, a copy of which constitutes Appendix No. V. And all else that appears ever to have been done by that Board in the matter was the vote of the 26th of June, above cited.

Now your Committee believe that the only reasonable and just inference from all these proceedings is, that the Overseers having made a claim, as matter of constitutional right, and submitted it to the consideration of the Corporation, and that Board denying any such constitutional right, and stating their reasons for such denial in full in a counter report of equal publicity and permanence, but being willing, from motives of delicacy and sound policy, to acquiesce in an arrangement to effect the end desired by the Overseers, the controversy, if such it may be called, was amicably arranged by the agreement of the Corporation to enact a vote to that effect, to constitute a by-law for the future.

If the Corporation had intended to acknowledge the legal right claimed by the Overseers under the Charter, some vote expressive of the receipt of it and of such acquiescence would have been the only proper and the natural course of action. Or at least they would have proceeded

thereafter simply to send up salaries for concurrence, as they did elections of members to the Board, and rules and by-laws. But instead of doing this, they proceed formally to enact an order or by-law, that they will thereafter send up to the Overseers the votes determining certain particular salaries for their approbation and consent, — a perfectly senseless proceeding *if such was their obligation under the Charter*. And they take especial pains to give to this enactment the precise form and character of an order or by-law, as distinguishable from any recognition of a chartered obligation, by appending to it the necessary element of an order or by-law, namely, that it should be submitted to the Board of Overseers *for their approval*; which would be absurd if intended as *any acknowledgment of their absolute right under the Charter to all that the order provided for*.

That this is the true solution of this transaction is further strikingly manifested by the action of the Overseers themselves, when the order was presented to them, who, instead of contenting themselves with a mere statement of their consent, as was usual, added to their vote declaring it the words, "it appearing to this Board to be agreeable to the Charter," — evidently to exclude the conclusion, otherwise inevitable, that they had thus confessed themselves in error, and had surrendered their claim of absolute constitutional right, and accepted a by-law, founded upon a voluntary action of the Corporation, in place of it.

It was a clear case of mutual arrangement, the Corporation denying the legal obligation, but willing to adopt the proceeding in a form that should not commit it to any acknowledgment of such obligation; and the Overseers not being disposed to record an unreserved surrender of their claim, but willing to accept the substitute proposed by the Corporation, with a salvo that it should not be understood as admitting their claim to be untenable. Whether this salvo was thus attached because the majority

of the Overseers were not convinced by the reply of the Corporation that the claim was not maintainable, or because they considered it a doubtful matter, or from delicacy to their committee, who had so confidently urged it, or from any other cause, is of no consequence. It was clearly, on the part of the Overseers, a practical surrender of their alleged constitutional right, and a practically successful resistance of it by the Corporation. And considering the relative power and influence of the two Boards at that time, it is difficult to believe that the Overseers would not have insisted upon their right, and have refused acquiescence in any such arrangement inconsistent with it, if not upon the whole convinced that it was untenable, or too questionable to be made the subject of any controversy injurious to the interests of the College. Can any instance be found, on the records of either Board, of an enactment of an order or by-law for the sending up of elections of members of the Corporation, or of orders and by-laws, or of anything else which by the Charter the Corporation is required to send up, — or any vote of the Overseers relating to any such subject, to which they thought it necessary to append such a salvo?

And there were exceedingly good reasons why this requisition of the Overseers for a supervision over the establishment of the salaries of those employed in the Government of the College should have been at that time acquiesced in by the Corporation. As has been stated, five out of the seven members of it — three of them being principal instructors — were drawing salaries from the common treasury. Delicacy, therefore, and a sense of propriety, as well as due regard for public confidence and goodwill, would naturally prompt on their part a willingness that salaries appointed by themselves, a majority of whom were directly interested in such appointments, should be submitted for the approval of the higher Board; and especially of one possessing such widely spread public regard and influence. And these motives doubtless received

great additional impulse from the circumstance that the question of the establishment of another rival College in Berkshire had begun to be agitated, creating great alarm among the friends of Harvard ; and also from the fact that application was about to be made to the General Court for aid in means to erect another hall, which had become necessary ; so that cordially united and mutually friendly efforts of both Boards were called into active requisition for the protection and welfare of the institution over which they presided.

The order or by-law thus established was, as the Report states, most faithfully complied with by the Corporation down to the year 1811, when another was passed, providing that the salaries enumerated in it should be paid quarterly, until they should be altered by the Corporation, with the approbation of the Board of Overseers ; since which time, as is further stated in the Report (pp. 22, 23), the Committee "upon cursory examination have noticed not more than three or four instances in which votes adopted by the Corporation respecting salaries have been presented by them to the Overseers for their consideration and approval."

It is worthy of notice, in this connection, that the votes of the Corporation establishing salaries, sent up to the Overseers for confirmation in the years 1761 and 1810, and cited in the Report under consideration (pp. 19 – 21), embraced salaries of officers clearly not in the government of the College in any sense, and therefore not within the scope of the order or by-law of 1761, — for instance, the clerk of the Overseers, the Hebrew Instructor, and the Librarian, — and also included grants for clerical services, &c. ; to all which there could be no pretence that the consent of the Overseers under the Charter was considered by them as necessary at the time when that order was enacted. This goes far to prove that the Corporation, in thus sending them up, was not acting under any admitted obligation under the Charter, nor acting exclusively even under that

of the by-law, but was doing so from a disposition to lay all their proceedings on these subjects before the Board of Overseers.

Your Committee deem it unnecessary to advert further to the argument adduced by the committee of the Overseers in the report of 1761, in favor of the limited claim then made, and founded upon the fifth clause of the Charter, than to refer to the views they have already presented when considering the true construction of that clause, and the subject of appointments (pp. 23 - 28), and to its palpable inconsistency with the claim and argument now advanced, and its implied entire abandonment by the Committee in the Report under consideration, to whose chairman it was not unknown.

Nor is it needful to recapitulate the reasons why, if the Corporation could be supposed ever to have temporarily relinquished a power vested in them by the Charter, or to have submitted to any restriction upon its exercise, such relinquishment or submission, in whatever form, could be of no legal obligation, but would become a practical violation of duty and breach of trust, whenever, in the exercise of their judgment, the continuance of it should become inconsistent with the interests of the College; as these reasons have been already stated in considering the subject of Appointments (pp. 79, 80). That no practice of that nature could avail to deprive the Corporation of the right to resume the power, there is, for the purposes of this discussion, the highest authority in the principle avowed by the learned Committee in their Report (p. 17); but, as above shown, no such practice implying the admission of any such right has ever existed.

Upon the foregoing review of the whole history of the College upon this subject, and of the particular evidence adduced by the learned Committee of the Overseers in support of their claim of "the right of confirmation or revision respecting the votes and doings of the Corporation in relation to salaries and allowances to instructors and

officers," your Committee respectfully submit, that it has no valid foundation in the Charters, nor in any acknowledgment by the Corporation, nor in any practice implying it. But, on the contrary, that the absolute and exclusive right of the Corporation to establish salaries, uncontrolled by the Board of Overseers, is expressly ordained by the Charter; that all attempts on the part of that Board to exercise any such control, as a matter of constitutional right, have been successfully resisted by the Corporation and ultimately abandoned by the Overseers; and that the uniform practice of both Boards has, excepting in such attempts, been from the beginning in accordance with the possession of such exclusive power by the Corporation,—the only seeming departures from its assertion, or acknowledgment, being clearly shown to have been founded upon orders or by-laws voluntarily enacted by the Corporation and approved by the Overseers, and so constituting additional proof of its existence.

A very striking and recent illustration of the entire mutual understanding of the two Boards upon the subject of salaries, and all other matters of finance, and of the novelty of the claims now made, is found in their proceedings in 1841. The Board of Overseers in the month of January of that year, being, as it would seem, either under an impression that the Corporation had not been so communicative of their proceedings as might be expected, or desirous of fuller information of the nature of their duties and of the manner in which they were performed, sent down a request, on the motion of an eminent legal member of the Board, that the Corporation would lay before that Board, "for the information of the members thereof, a copy of the records of the Corporation for the last two years, so far as they related to matters of general interest, or such as might be deemed proper by the Corporation to be made known to the Board of Overseers." And it was therefore voted by the Corporation, "That, pursuant to the said request, the President be authorized to lay before the

Board of Overseers such parts of the proceedings of the Board, for the last two years, as relate to matters of general interest, and which are proper to be communicated to that Board."

In pursuance of these votes, a copy of all the records of the proceedings of the Corporation for the two years named in them, excepting such as related to financial concerns, was laid before the Board of Overseers; and the same was received with expressions of entire satisfaction, and of no little surprise at the number of meetings and amount of labor thus exhibited. Not an intimation was suggested or hinted that there was any subject omitted in the report which it was proper should be laid before the Overseers, although it was plainly impossible for them to have overlooked concerns of such importance as the investments of the funds of the College, its expenditures, salaries, &c., if they had been considered by any member of the Board as falling within the limits of its request.

Negative evidence more entirely conclusive than this of the entire understanding of the two Boards that the subjects of finance and salaries were not among those over which the Board of Overseers had rightful revision and control, cannot easily be imagined. It may also be well to remember that the Corporation at that time included Mr. Justice Story and the Chief Justice of the Commonwealth, and that the Overseers possessed a full share of legal talent and learning, and were bent, as their vote shows, upon the faithful exercise of all their legitimate authority.

Another occurrence of still later date is perhaps more strikingly indicative of the same mutual understanding of the reciprocal rights and obligations now in question. The Statutes and Laws of the University underwent an entire revision by both Boards in the year 1848, and a code was adopted by their concurrence, after amendments by the Overseers. This code purports to contain all the laws of the University, including those of its general organization

and government. It contains, in Article 5, a precise description of the duties of the Treasurer, including that of submitting his accounts to committees appointed for the purpose by the Corporation and Overseers, and that of *making annually to the Overseers a general statement of the receipts and expenditures of the institution.*

It states, Article 28, that all the officers of instruction and government in the University are chosen by the Corporation, with the concurrence of the Overseers, and are subject to removal for inadequate performance or neglect of duty, or misconduct. But we look in vain for any article or suggestion that the action of the Corporation upon salaries, or any financial matters, is to be submitted to the Overseers, or be in any manner subject to their confirmation or revision. The only instances in which the subject is alluded to are in prescribing the duties of the Treasurer as above stated, and also in three cases where new salaries were to be created, — *in all which the power of establishing them is vested exclusively in the Corporation;* the statutes themselves approved by the Overseers being thus, so far as the subject is alluded to, in direct conflict with the claims now made by the Committee in their behalf. (See Articles 35, 133, 149.)

It is submitted with great confidence, that clearer proof could not be exhibited, that, up to the time of the revision and establishment of that code, in 1848, the Overseers did not claim, and did not imagine that they possessed, the power of revising and controlling the action of the Corporation in its investments and management of the finances of the College, or in the establishment of salaries; for it is impossible to believe that, if they considered themselves as having such powers, — the existence of which would necessarily involve the duty of a faithful exercise of them by active, regular, and systematic supervision and control, — they should, when acting upon the subject, have enacted no laws regulating, or enabling them to maintain and enforce, such supervision or control, or giving them opportunity for

such maintenance or enforcement, but should rest content with a mere proviso requiring of the Treasurer *an annual exhibition of what had been done*, and which of course would be too late for the exercise of the powers asserted; and that, in the only instances in which they should provide any law touching any salary, or expenditures, they should place the right to establish or make them in the Corporation wholly, and independently of any such right of revision or control on the part of the Overseers. To suppose that the Overseers considered themselves as possessing the powers now claimed, and with that knowledge approved of this code, is, your Committee respectfully submit, to suppose them wanting in fidelity to the trust reposed in them, which no one can think possible in reference to such subjects.

In regard to the present position of the two Boards, and the course to be hereafter pursued upon this subject, your Committee are of opinion that the question whether the establishment of any particular salary, or class of salaries, shall be submitted to the Board of Overseers, and so made subject to their consent or rejection, is one to be decided by the Corporation, according to their best judgment and discretion, whenever it shall arise for decision. No such uniform practice in favor of such submission can be pretended as has existed in respect to appointments to office; nor have any reasons in favor of such a practice presented themselves, or been suggested to the minds of your Committee, which could lead to its continuance, if existing, or to its future establishment. The order or by-law of 1761 was clearly repealed by that of December, 1810, and this has been virtually abrogated by mutual consent of both Boards;—all the salaries established by it having been altered, and some of them repeatedly, these changes being of course known to the committees of the Overseers in their annual examinations of the Treasurer's accounts, and appearing in his printed Reports above mentioned; and numerous new salaries having been estab-

lished, the existence of which was not only made known in like manner, but must have been in every instance brought to the knowledge of the Overseers, or suggested to them, when appointments to the new offices to which they were attached were presented for confirmation. And your Committee are unable to perceive in the nature of the case, or in any exigencies of the College, any reason to revive any such law, or to depart from a practice in conformity with the chartered relations of the two Boards, which existed for the first century and more, and has characterized the last forty years.

TENURE OF OFFICE.

The subject of Tenure of Office in the College is disposed of by the Committee of the Overseers (Rep. p. 15) in a few general propositions composing one paragraph, and founded upon the idea underlying the whole Report, that the powers of appointment and of establishing salaries are vested in the Corporation by the third clause, and that all are subject to the control and supervision of the Overseers by virtue of the proviso at its close. The error of the last-mentioned position your Committee believe to require no further exposition.

No practice can be adduced on either side in confirmation or disproof of the claim here set up. There have been, as your Committee believe, but two recorded cases of removal of College officers; one of a professor in 1738, by a vote of the Corporation, concurred in by the Overseers, and one of a tutor, which took place in 1742; the proceedings of both Boards in regard to which were such as to make them very clearly no precedent of constitutional right on either side.

If the views concerning the true intent and meaning of the third clause above presented by your Committee, in treating of the construction of the Charter, and of Appointments and Salaries, be correct, the power of removal of

College officers is, by the Charter, vested solely in the Corporation; and therefore the consent of the Overseers is not required by it, excepting in those cases where the foundations of professorships, or other offices, provide that the consent of the Overseers shall be required for such removal.

If, at the expiration of the term for which any officer were appointed, a renewal of his appointment for the same or any other term should be made, the Corporation would doubtless, in analogy with their practice in cases of original elections, present such renewal for confirmation. It is apprehended, however, that the mere continuance of an officer, who had been approved by the Overseers when appointed, in the performance of the same duties, after the expiration of the term for which he was so appointed and approved, — no change having taken place in the services required of him, or in other relations affecting his position, — would be a very different case in principle and policy from that of a new appointment, and could not be with propriety accounted any irregularity, as the learned Committee assume. It is a case in which this Board would be at entire liberty to exercise its discretion in regard to any new presentation to the Overseers; though, where a determinate intention existed of any permanency in such continuance, they would unquestionably make one.

Your Committee having thus endeavored carefully, and, as they hope, with becoming candor and respect for the honorable Committee whose Report they have been considering, to discharge the duty imposed upon them in reference to the subjects of inquiry specified in the vote of the Overseers appointing said Committee, and in reference to all concerning which it is proposed that joint rules should be adopted for securing the respective rights of the two Boards, and for regulating their future intercourse, — namely, Finances, Donations, Appointments, Salaries, and Tenure of Office, — they would very gladly here terminate their laborious task.

All the topics above mentioned are within the express provision of that vote and the resolution appended to the Report appointing the same gentlemen as a committee of conference, and involve no other issues than those of such honest diversities of opinion as might arise upon questions of legal construction of the College Charters, and the weight of historical evidence. But one other remains, which your Committee do not perceive to be embraced in either that vote or resolution, involving a very different issue, over which that Committee have assumed jurisdiction, — allusion to which here will, as your Committee trust, be attributed, not to undue sensitiveness, but to a reasonable self-respect, which may not permit this Board to pass it in silence. They refer to the increase of salary recently attached to the office of the College Treasurer.

TREASURER'S SALARY.

This subject occupies a conspicuous position in the Report, from the space devoted to it, and from the very pointed remarks in which the Committee have seen fit to indulge in reference to it; and also from its obvious tendency to bring severe reproach upon the Corporation, which, it is to be presumed, nothing but an imperious sense of duty on the part of the gentlemen composing that Committee could have led them to design.

After a very cursory allusion to the history of the treasuryship, from the year 1810 to the year 1852, for the purpose of attempting to show that the incumbents of the office during that period had derived from it no pecuniary emolument, — but with no reference to the great changes in the nature and extent of the services and responsibilities which in the later portion of it have occurred, — the Committee proceed to use the following language: “The Committee, therefore, *are surprised to learn* that the Corporation did, on or about a year prior to the resignation of Mr. Eliot, viz. about November 27, 1852, pass a vote direct-

ing a salary of fifteen hundred dollars to be paid to the Treasurer, which was over and above the usual allowance to him of about eight hundred dollars per annum, for expenses of clerk-hire, rent of office, etc. *Under such circumstances, it is difficult to comprehend for what reason said order or vote was adopted.*" (Rep. pp. 24, 25.)

They proceed immediately to add: "The Committee have no doubt that there are *many* highly respectable gentlemen in this community, of perfect responsibility, and every way qualified for the situation, who would take this office, being one of high honor and dignity, and discharge its duties faithfully and satisfactorily, without compensation. *They therefore cannot, without further information than they have been able to obtain, perceive any good reason why the Government of the College may not save this sum of fifteen hundred dollars every year.* The vote by which the Corporation undertook, in 1852, to attach a salary of fifteen hundred dollars to the office of Treasurer, has never been presented to this Board; *and the passing of the same by the Corporation furnishes, in the opinion of the Committee, pregnant evidence of the propriety of its being insisted upon by the Overseers, that they should have an opportunity to pass judgment upon every vote of the other Board in relation to salaries and allowances to officers and instructors.*" (Rep. p. 25.)

They then proceed to intimate, that the only amount of salary now legally established is that ordained by the vote of 1810, and that therefore the amount paid pursuant to the vote of 1852 has been unlawfully appropriated.

Your Committee have given these extended extracts, that they may not be thought to have been led into any misrepresentation or exaggeration of them, in the comments upon their nature and tendency about to be submitted; although any such comment on language so explicit and so pregnant of suggestion may perhaps be thought superfluous.

Upon the perusal of these passages, who could doubt that a serious wrong had been committed? If a Committee

composed of persons of the intelligence and fidelity which characterize the members of that which made this Report, and a Board consisting of the numerous eminent and faithful men who constitute that of the Overseers, by whom it was adopted, and who, it appears, consider themselves supervisory guardians of the College, with the duty upon them of exercising especial watch and ward over its finances, *were surprised, in the year 1856, to learn of a very large and seemingly unaccountable and useless expenditure of its funds made in the year 1852, and repeated annually for three succeeding years, and this surprise was so great, and the cause of it so fraught with danger, or so reprehensible, as to render it necessary, in the opinion of the Committee, to recommend the adoption of very stringent precautions to prevent the possibility of any such hereafter, — who could doubt that there must have been some designed concealment on the part of the Corporation, or some covert proceedings in relation to the matter, — or, at the least, some great carelessness or negligence in the omission of notice to the Overseers, which might imply a disregard of duty scarcely less reprehensible than an intended violation of it. And the reader would at once be led to consider it as an imitation, by the present Board, of the alleged doings of their predecessors, who, in the forcible language of the Report (p. 9), “kept close upon their books most of their doings, and it sometimes happened important votes or orders were unknown to the Overseers for years.”*

Nor could any reader of these passages presume to question that the highly respectable gentlemen who compose that Committee, appointed to represent one of the most public and dignified corporate bodies known in the Commonwealth, in inquiries upon topics of great importance, and the results of whose investigations were to be returned to their numerous constituents, and probably printed, had made some reasonable efforts to inform themselves of the causes and motives which led the Corporation to establish such an increase of the Treasurer's salary, before thus

recording and publishing the assertion, that they found it "*difficult to comprehend for what reason said order or vote was adopted,*" and "*could not, without further information than they had been able to obtain, perceive any good reason for the expenditure*";—thus implying the severest and most pregnant of strictures upon those employed in the administration of a high public trust, and who had once at least possessed their confidence and respect so far as to be confirmed in the office thus impliedly represented to have been perverted or abused. Nor could the emphatic remark, that the alleged omission to present to the Overseers this vote is *pregnant evidence of the propriety of its being insisted upon by the Overseers, that every one relating to salaries and allowances should be so presented,*—escape his observation, as a signal rebuke, thought to be due for this supposed violation of duty.

The necessary inference would of course be, that the Corporation, with opportunity given for explanation; or upon reasonable request for the desired information, had either confessed that they were unable or unwilling to state "*for what reason said order or vote was adopted,*" or to give any information tending to show this additional expenditure justifiable; or else had negligently omitted to respond, and therefore had impliedly admitted themselves unable to render any such reason or explanation.

And thus the President and Fellows of Harvard College, upon the unequivocal and most obvious purport of this language, stand publicly arraigned and rebuked for designed concealment or unpardonable negligence in withholding information of their doings,—information which the Overseers were entitled to have,—and for a corrupt or faithless or reckless expenditure of the funds intrusted to their keeping; while, in the mean time, a recent movement in the Legislature, now pending, and pointing with no doubtful significance to this charge as its origin, or authority, tells of its natural effect upon the popular mind.

In dealing with a subject of such grave importance, and

so nearly a personal one to every member of this Board, your Committee desire to evince towards the Committee who framed the Report, and the reverend and honorable Board by which it was adopted, the most entire respect; but in discharging their duty of replying to these charges, and while considering that of concealment or negligent omission implied in the alleged *surprise with which the discovery was made of the fact of the increase of the Treasurer's salary*, your Committee must be allowed humbly to express their own, that the learned Committee in preparing a Report so elaborate, and purporting so much reference to documents, and that the members of the Honorable Board of Overseers in adopting it, should admit themselves to have been surprised by the discovery of a fact, which it would seem (if your Committee may be allowed the suggestion) to have been in the way of their ordinary duty to have known three years previously, of which they had full evidence then before them, and of which they have received official notice every year since.

The first grant was made, as the Committee state, in November, 1852; and accordingly it was duly charged, and somewhat conspicuously so, heading a column in the Treasurer's printed Report for 1853 (p. 10), in his Report for 1854 (p. 8), and finally in his Report for 1855 (p. 10), about two months before the Report under consideration was presented to the public.

Let it be observed, that in 1853 this was a prominent introduction of an entirely new charge of so large a sum in the Treasurer's account; for it does not appear as an increase of the preceding allowance, set down as had before been usual, but as a new and distinct item of \$1,500, with the Treasurer's name in full as the recipient; and it was in like manner distinctly marked and set forth in each succeeding year. So that the Overseers had full information of this fact placed in print before their eyes when it occurred, and for three successive years, and information of precisely the same nature of that, with which they had been ap-

parently entirely satisfied, concerning all other salaries, old or new, for the thirty or more years preceding. For the Report finds, that, "from the beginning of the year 1811 to the present time, the Committee have not noticed more than three or four instances in which votes adopted by the Corporation respecting salaries have been presented by them to the Overseers for their consideration and approval"; while the annual reports of their committees, and the frequent submission to them of appointments to new offices, must have constituted continually occurring information that old salaries were from time to time changed, and new ones established.

So far, therefore, from there having been any concealment, or negligent omission to give notice to the Overseers, of this increase of the Treasurer's allowance, or any ground for the alleged surprise, or any justifiable cause of censure, it is respectfully claimed, that the Corporation, in this instance, had done all which, by the practice of the two Boards for the thirty or forty years preceding, it had been usual to do in like cases, — a practice which had received the time-honored sanction of the Overseers themselves, long before any of the present members of the Corporation were appointed to office, and throughout the whole period of their service.

The further imputations cast upon this Board by the Committee of the Overseers, in their statement that they found it "difficult to comprehend *for what reason said vote was adopted,*" and that they could not, "*without further information than they have been able to obtain,* perceive any good reason" for this expenditure, have excited in the minds of your Committee still deeper and more painful surprise; — indeed, such declarations appear to them entirely unaccountable. It seems incredible that the learned Committee should have been willing to attempt the infliction of such public reproach upon the members of a body associated with them in the administration of a great institution, without taking the trouble of looking into the records of

their proceedings, or, at the least, that of asking a simple question of any one of them. And yet, if they had done either, it seems impossible that they could have made such charges or implications. Had they turned to the records of the Corporation, whose books have been and are always freely open to their inspection, or had they condescended to make inquiry of any member of that Board, they would have ascertained that this increase of the Treasurer's salary had been one of very careful consideration; that the subject had been placed in the hands of a large committee, who, after time for inquiry and deliberation, had made a report, fully setting forth the *reasons which induced them to recommend* an augmentation; that it was in pursuance of that report that the "said order or vote was adopted"; and that it was then placed, and has ever since continued to be, on their files, for the inspection of all persons interested to see it.

Whether those reasons would have been, or will now be, satisfactory to the gentlemen composing that Committee, is not now the question. They are certainly those for which the "said order or vote was adopted"; moreover, there can be no pretence of difficulty in ascertaining that they were so, or in comprehending them when discovered. That report your Committee annex, as Appendix No. VI., for the purpose of a more full exhibition of the motives and reasons actuating the Corporation in that measure, than could be conveniently made by any recapitulation of them.

And the Committee of the Overseers might further have found, had they made inquiry of any member of the Corporation, that the present Treasurer, soon after his appointment to office, had generously proposed to the Board to appropriate the amount to be received for his services towards the establishment of scholarships, or in aid of such other charities or foundations as they should approve.

Thus, then, it appears that the Corporation, so far from having no reasons to assign for their procedure in this mat-

ter, or being unwilling to disclose those reasons, or neglecting to disclose them when called upon, have acted upon reasons by them carefully considered, and made permanently known and accessible on their records and files to all persons having any right or interest to make inquiries concerning them; and that the amount thus paid to the present Treasurer has not been thus lost to the College, as the Report plainly implies.

With regard to the assertion by the Committee of their having *no doubt* that *many persons* of suitable qualifications may be found to discharge the duties of this office gratuitously, your Committee beg leave respectfully to say, that the belief in generalities of this description, however honestly entertained by those who have never tried the experiment, is not the most satisfactory evidence of their reasonableness. The duty imposed upon the members of the Corporation to make appointments, is one which they are required by the nature of their trust to fulfil according to their own discretion, and under a sense of personal responsibility from which they cannot be released by the opinions of others. It may be easy to find good accountants, and reliable men, suitable for the keeping of books and of making investments of property; but the College Treasurer, as a member of the Corporation, and entitled to an equal voice and vote with every other member upon all questions presented for its decision, has other, and often higher, duties to perform; and it may not be unreasonable to assume that of his qualifications for these the members of the Corporation may be judges as competent as any other persons, while having upon them the further sole responsibility of choice in the first instance.

How long it may be practicable to procure the services of competent and high-minded men, who with suitable talents and attainments may be able and disposed to devote their time and labor to the duties of this office, with its very numerous and daily increasing labors, perplexities, and anxious responsibilities, — with the disposition of the pres-

ent incumbent generously to devote the reasonable salary attached to it in aid of College charities,— your Committee of course cannot predict; though they cannot forbear the expression of their apprehension, that the same causes which now seem to him to compel his retirement may render the probability of such disinterested service hereafter less than it hitherto may have been.

But however that may be, your Committee see no cause to change the clear conviction, which all the members of this Board entertained at the time of establishing this salary, of the propriety and necessity of the measure, not only as one of simple justice, but also in order to secure a proper and effective sense of responsibility, both on the part of the Treasurer in the rendering of his services, and of the Board in passing upon the performance of them; thus placing him upon the platform of the strictest legal, as well as of high moral obligation, while not taking from him the opportunity, should his means and disposition allow, of enrolling himself at the same time among the honorable and distinguished benefactors of the College.

The distinction between the position of the Corporation at the time when a large majority of its members were recipients of salaries appointed by it, and its condition at the present time, when only two receive such compensation, and the corresponding urgent propriety of sending up for concurrence such appointments in the one case, and its cessation in the other, are considered too obvious to require comment. The subject, as your Committee are satisfied, is one resting wholly in the discretion of the Corporation, and upon which its members must act, as occasions occur, according to their own sense of duty to the institution under their immediate charge.

CONCLUSION.

If the views of your Committee, as above presented, be correct, it follows, that the only legitimate subjects of any such "joint rules as shall secure to the two Boards, as far as it may be practicable, their respective rights," "and provide for the prompt transmission of all such votes of the Corporation to the Overseers as they may have a right to confirm or reject, revise, or take action upon," are the election of officers and members of the Corporation, and the enactment of "orders and by-laws for the better ordering and carrying on of the work of the College," embracing, of course, the statutes and foundations of professorships, and of any new offices in the government or instruction of the institution which may from time to time be established;—these being the only ones over which, by the Charters, the Board of Overseers has any legal authority of revision or control. For it is obvious that joint rules imposing legal obligations on the two Boards respectively should be confined to matters in which each has legal power, and is under a legal duty to act in concert with the other.

But as the Corporation must ever be solicitous, not only to come up to the full measure of its legal obligations in reference to the Board of Overseers, but also to comply with all reasonable arrangements desired by it touching their mutual intercourse, and especially to secure to it prompt notice of all proceedings of which it should have cognizance, and in cases where its aid and advice may be sought, which the Charters give to this Board the right to ask for, and also in those where its sanction may be desired;—and further, as appointments of officers of instruction and government have been hitherto uniformly presented to that Board for confirmation or rejection, and sound policy and the best interests of the College seem to sanction a continuance of the practice,—your Committee recommend the adoption by this Board of the following Resolutions:—

1. *Resolved*, That the Committee of Conference appointed

by this Board is hereby instructed to confer with that of the Board of Overseers, upon the establishment of such joint rules and orders regulating the intercourse between the two Boards upon the subjects of elections of officers and members of the Corporation, and of such orders and by-laws for the better ordering and carrying on of the work of the College, as the Committees shall think advisable; and to report to this Board the result of its conference, for its approval or rejection.

2. *Resolved*, That this Board will present to the Board of Overseers all elections made by it to any offices of government or instruction in the College, as soon as conveniently may be after such appointments; and that every vote and resolution making such appointment shall be so laid before the Board of Overseers, accompanied by or including a vote importing that such appointment shall be laid before them, that they may concur therein if they see fit. And no such appointment shall be held valid after the Board of Overseers shall have decided not to concur therein.

3. Whereas it is provided by the Charter, that the President and Fellows of Harvard College be constituted a corporation and body politic, and they and their successors are enabled and empowered to purchase and acquire to themselves, or take and receive upon free gift and donation, any lands, tenements, or hereditaments, and any gifts and sums of money whatsoever, to the use and behoof of the said President and Fellows and scholars of said College; and whereas it may sometimes so happen that grants and donations may be made to the use of the College for the promotion and advancement of such specific objects and purposes expressed therein as may render it, in the opinion of this Board, doubtful whether such objects and purposes are within the general scope and purpose for which the College is established, or such donations may be offered upon such terms and conditions as render it thus doubtful whether the acceptance of them upon those terms and conditions would be for the benefit of the College; and whereas, by the express provisions of the Charter, the Cor-

poration is entitled to the benefit of the advice and counsel of the Overseers in great and difficult cases, and cases of non-agreement;— therefore *Resolved*, That, in all such cases, the President and Fellows, after expressing their own opinion by a proper vote or resolution, either accepting or declining to accept any such proffered donations, for the objects or purposes, or upon the terms and conditions, therein expressed, — and thereby also declaring that such vote or resolution, accepting or declining to accept such donations, shall not take effect or be deemed conclusive until the same shall have been laid before the Board of Overseers for their concurrence or advice, — will forthwith, as soon as conveniently may be, present the same to the Board of Overseers; — and that, if the Board of Overseers shall not concur in such opinion and resolution of this Board, the subject shall remain for the further action of the two Boards thereupon.

This last resolution vests in the Overseers power to prevent the acceptance of any donation encumbered with terms or conditions of doubtful expediency; but does not vest in them authority to compel the Corporation to receive gifts accompanied with provisions which its members may consider inconsistent with prerogatives, or incompatible with duties for the exercise and performance of which they alone are legally accountable.

As all the financial operations of the Board are substantially laid before the Overseers in the annual printed reports made by the Treasurer, and all the salaries paid are also distinctly set forth in it, your Committee are not aware of the necessity of any resolutions or rules for the more perfect securing of the rights of the Board of Overseers, or for the exhibition to them of any further information which might be useful in enabling them to discharge any duties incumbent upon them. If any views which may be suggested by the Committee of the Overseers should render any such resolutions or rules, in the opinion of your Committee, desirable, they will report the same for the consideration of this Board.

In bringing their labors to a close, your Committee have no wish to conceal their consciousness of liability to error, omission, and misapprehension, in an investigation extending over so wide a field, and embracing so many topics, and about which different opinions are known to exist.

All which they desire, therefore, to claim for themselves, is the confidence in their statements and conclusions to which they may be entitled by reason of careful investigation, a desire honestly to exhibit every fact known to them considered material to the discussion, and an intention to draw from them such inferences only as reason and candor shall approve. Meanwhile it is to them matter of satisfactory reflection, and confirmatory of the views they entertain, that their conclusions are not only, as they believe, in entire accordance with the Charters of the College, but also with the practice of both Boards, properly understood, for by far the greater portions of time which have elapsed since its foundation, and especially for nearly the last half-century, — conclusions, therefore, which may claim the practical sanction of the Overseers, and require no changes of the manner in which the affairs of the College have long been harmoniously and successfully conducted.

Nor can your Committee withhold the expression of their profound sorrow at the death of the eminent member of the Board of Overseers, and of their Committee of Conference, whose recent departure is so universally lamented throughout the Commonwealth; who so faithfully and ably discharged his duties wherever they lay; and in whose candor, learning, and love of truth your Committee had placed great reliance for the final and mutually satisfactory adjustment of the questions thus brought into discussion.

All which is respectfully submitted.

JAMES WALKER,
LEMUEL SHAW,
CHARLES G. LORING.

At a special meeting of the President and Fellows of
Harvard College, in Boston, November 15, 1856 : —

The Committee appointed to confer with that appointed by the Overseers, under their resolve of January 31, 1856, and instructed to take into consideration, and report to this Board, the nature and extent of the rights claimed by the Overseers, as represented at a conference held by the Committee, and of the corresponding obligations of this Board, and such other matters embraced in the Report made by the Committee of the Overseers to that Board as shall be thought proper, — submitted their Report.

Whereupon it was

Voted, That the Report be accepted, and the Resolutions appended thereto adopted ; also, that the Report and Resolutions be printed, under the direction of the Committee.

A true copy of record.

Attest,

GEORGE PUTNAM, *Sec'y.*

APPENDIX.

APPENDIX.

No. I.

AN ACT ESTABLISHING THE OVERSEERS OF HARVARD COLLEGE.

At a General Court held at Boston, in the year 1642.

WHEREAS, through the good hand of God upon us, there is a College founded in Cambridge, in the county of Middlesex, called HARVARD COLLEGE, for the encouragement whereof this Court has given the sum of four hundred pounds, and also the revenue of the ferry betwixt Charlestown and Boston, and that the well ordering and managing of the said College is of great concernment :—

It is therefore ordered by this Court, and the authority thereof, that the Governor and Deputy Governor for the time being, and all the magistrates of this jurisdiction, together with the teaching elders of the six next adjoining towns, viz. Cambridge, Watertown, Charlestown, Boston, Roxbury, and Dorchester, and the President of the said College for the time being, shall, from time to time, have full power and authority to make and establish all such orders, statutes, and constitutions as they shall see necessary for the instituting, guiding, and furthering of the said College, and the several members thereof, from time to time, in piety, morality, and learning ; as also to dispose, order, and manage, to the use and behoof of the said College and the members thereof, all gifts, legacies, bequeaths, revenues, lands, and donations, as either have been, are, or shall be conferred, bestowed, or anyways shall fall or come to the said College.

And whereas it may come to pass that many of the said magistrates and elders may be absent, or otherwise employed in other weighty affairs, when the said College may need their present help and counsel, — It is therefore ordered, that the greater number of magistrates and elders, which shall be present with the President, shall have the power of the whole. Provided, that if any constitution, order, or orders, by them made, shall be found hurtful unto the said College or the members thereof, or to the weal-public, then, upon appeal of the party or parties grieved unto the company of Overseers first mentioned, they shall repeal the said order or orders, if they shall see cause, at their next meeting, or stand accountable thereof to the next General Court.

No. II.

THE CHARTER OF THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE, UNDER THE SEAL OF THE COLONY OF MASSACHUSETTS BAY, AND BEARING DATE MAY 30, A. D. 1650.*

WHEREAS, through the good hand of God, many well-devoted persons have been, and daily are, moved and stirred up to give and bestow sundry gifts, legacies, lands, and revenues, for the advancement of all good literature, arts, and sciences in HARVARD COLLEGE, in Cambridge, in the county of Middlesex, and to the maintenance of the President and Fellows, and for all accommodations of buildings, and all other necessary provisions that may conduce to the education of the English and Indian youth of this country in knowledge and godliness : —

Clause
I.

It is therefore ordered and enacted by this Court and the authority thereof, that for the furthering of so good a work, and for the purposes aforesaid, from henceforth that the said College in Cambridge, in Middlesex, in New England, shall be a Corporation, consisting of seven persons, to wit, a President, five Fellows, and

* The clauses in the Charter referred to in the preceding Report are indicated in the margin for facility of reference.

a Treasurer] or Bursar; and that HENRY DUNSTER shall be the first President, SAMUEL MATHER, SAMUEL DANFORTH, Masters of Art, JONATHAN MITCHELL, COMFORT STARR, and SAMUEL EATON, Bachelors of Art, shall be the five Fellows, and THOMAS DANFORTH to be present Treasurer, all of them being inhabitants in the Bay, and shall be the first seven persons of which the said Corporation shall consist; and that the said seven persons, or the greater number of them, procuring the presence of the Overseers of the College, and by their counsel and consent, shall have power, and are hereby authorized, at any time or times, to elect a new President, Fellows, or Treasurer, so oft, and from time to time, as any of the said person or persons shall die or be removed; which said President and Fellows for the time being shall for ever hereafter, in name and fact, be one body politic and corporate in law, to all intents and purposes, and shall have perpetual succession, and shall be called by the name of President and Fellows of Harvard College, and shall from time to time be eligible as aforesaid; and by that name they and their successors shall and may purchase and acquire to themselves, or take and receive upon free gift and donation, any lands, tenements, or hereditaments, within the jurisdiction of the Massachusetts, not exceeding the value of five hundred pounds per annum, and any goods and sums of money whatsoever, to the use and behoof of the said President, Fellows, and scholars of the said College; and also may sue and plead, or be sued and impleaded, by the name aforesaid, in all courts and places of judicature within the jurisdiction aforesaid.

And that the said President, with any three of the Fellows, shall have power, and are hereby authorized, when they shall think fit, to make and appoint a common seal for the use of the said Corporation. And the President and Fellows, or major part of them, from time to time, may meet and choose such officers and servants for the College, and make such allowance to them, and them also to remove, and, after death, or removal, to choose such others, and to make, from time to time, such orders and by-laws, for the better ordering and carrying on the work of the College, as they shall think fit; provided, the said orders be allowed by the Overseers. And also, that the President and Fellows, or major part of them, with the Treasurer, shall have power to make conclusive bargains for lands and tenements, to be purchased by the said Corporation for valuable considerations.

Clause
II.

Clause
III.

Clause
IV.

- Clause V. And for the better ordering of the government of the said College and Corporation, Be it enacted by the authority aforesaid, that the President, and three more of the Fellows, shall and may, from time to time, upon due warning or notice given by the President to the rest, hold a meeting for the debating and concluding of affairs concerning the profits and revenues of any lands, and disposing of their goods (provided that all the said disposings be according to the will of the donors) ; and for direction in all emergent occasions ; execution of all orders and by-laws ; and for the procuring of a general meeting of all the Overseers and Society, in great and difficult cases ; and in cases of non-agreement ; in all which cases aforesaid, the conclusion shall be made by the major part, the said President having a casting voice, the Overseers consenting thereunto ; and that all the aforesaid transactions shall tend to and for the use and behoof of the President, Fellows, scholars, and officers of the said College, and for all accommodations of buildings, books, and all other necessary provisions and furnitures as may be for the advancement and education of youth in all manner of good literature, arts, and sciences.
- Clause VI. And, further, be it ordered by this Court, and the authority thereof, that all the lands, tenements, and hereditaments, houses, or revenues, within this jurisdiction, to the aforesaid President or College appertaining, not exceeding the value of five hundred pounds per annum, shall from henceforth be freed from all civil impositions, taxes, and rates ; all goods to the said Corporation, or to any scholars thereof appertaining, shall be exempted from all manner of toll, customs, and excise whatsoever.
- Clause VII. And that the said President, Fellows, and scholars, together with the servants, and other necessary officers to the said President, or College appertaining, not exceeding ten, viz. three to the President, and seven to the College belonging, shall be exempted from all personal civil offices, military exercises or services, watchings and wardings : and such of their estates, not exceeding one hundred pounds a man, shall be free from all country taxes or rates whatsoever, and no other.

In witness whereof, the Court hath caused the seal of the Colony to be hereunto affixed. Dated the one and thirtieth day of the third month, called May, anno 1650.

[L. s.]

THOMAS DUDLEY, *Governor.*

No. III.

AN APPENDIX TO THE COLLEGE CHARTER, GRANTED BY AN ACT OF
THE GENERAL COURT OF THE COLONY, PASSED A. D. 1657.

At a General Court held at Boston, the 14th of October, 1657.

IN answer to certain proposals presented to this Court by the Overseers of HARVARD COLLEGE, as an Appendix to the College Charter, it is ordered, The Corporation shall have power, from time to time, to make such orders and by-laws, for the better ordering and carrying on of the work of the College, as they shall see cause, without dependence upon the consent of the Overseers foregoing. Provided always, that the Corporation shall be responsible unto, and those orders and by-laws shall be alterable by, the Overseers, according to their discretion.

And when the Corporation shall hold a meeting for agreeing with College servants; for making of orders and by-laws; for debating and concluding of affairs concerning the profits and revenues of any lands or gifts, and the disposing thereof (provided that all the said disposals be according to the will of the donors); for managing of all emergent occasions, for the procuring of a general meeting of the Overseers and Society in great and difficult cases, and in cases of non-agreement; and for all other College affairs to them pertaining,—in all these cases the conclusion shall be valid, being made by the major part of the Corporation, the President having a casting vote. Provided always, that, in these things also, they be responsible to the Overseers as aforesaid.

And in case the Corporation shall see cause to call a meeting of the Overseers, or the Overseers shall think good to meet of themselves, it shall be sufficient unto the validity of College acts, that notice be given to the Overseers in the six towns mentioned in the printed law, anno 1642, when the rest of the Overseers, by reason of the remoteness of their habitations, cannot conveniently be acquainted therewith.

No. IV.

REPORT OF OVERSEERS' COMMITTEE, MAY 13, 1761, RESPECTING THE POWER OF THE CORPORATION TO MAKE ALLOWANCES TO THE GOVERNORS OF THE COLLEGE, WITHOUT THE CONSENT OF THE OVERSEERS. THE COMMITTEE APPOINTED NOVEMBER 20, 1760.

THE Committee appointed the 20th of November last, by the Overseers of Harvard College, to consider "whether it be in the power of the Corporation to make allowances to those who are employed in the government of the College, without the consent of the Overseers," have carefully examined the College Charter; and find by said Charter, (which was granted in the year 1650,) that the Corporation have no power to make allowances to those who are employed in the government of the College, without the consent of the Overseers; and are of opinion that, so far as they have made such allowances, they have acted irregular.

The Charter gives the Corporation power to hold meetings "for concluding of affairs concerning the profits and revenues of any lands, and disposing of their goods, &c., in all which cases the conclusion shall be made by the major part, the Overseers consenting thereunto." From this clause it is plain that the consent of the Overseers is necessary to the disposing of the revenues of the College, in all cases wherein the Charter has not empowered the Corporation to dispose of said revenues independent of the Overseers. The Corporation "may choose officers and servants for the College, and make such allowances to them as they think fit"; but these allowances are to such officers (and those only) the choice of whom is in the Corporation *independent* of the Overseers. From this clause, then, it cannot be inferred that the Corporation have an independent right of making allowances to such as are to be chosen with the consent of the Overseers; nor, consequently, can it relate to such allowances as are made to their own members, to the choice and establishment of whom the consent of the Overseers is absolutely necessary. Further upon this head, the officers in said clause intended are neither the President nor Fellows, nor any concerned in the government of the College, *but such officers as are ranked*

after the scholars of the College; as may be collected from a subsequent clause of the Charter, wherein it is said, "that all the transactions aforesaid shall tend to the use and behoof of the President, Fellows, *scholars, and officers* of the College." The officers here intended, no doubt, are the Steward and Butler, and any other officers (if such there be) not concerned in the government of the College.

With regard to those who are concerned in the government of the College, the College revenues are to be disposed of with the consent of the Overseers. The introduction to said clause runs thus: "And for the better ordering of the government of said College and Corporation, be it enacted," &c. The disposing of the revenues in this clause mentioned is such a disposing as shall tend to the better ordering of the government of the College; that is, it is a disposing of said revenues to the support and encouragement of those concerned in the government of the College, for without such a disposition, the government of the College could not be well ordered, nor indeed subsist at all. With regard to this kind of disposition of said revenues, the consent of the Overseers is necessary. And this was the opinion of the General Court in 1722, as may be seen by the following Resolve: "That the President and Fellows of the said College, or the major part of them, are not warranted by the said Charter of the College [the Charter of 1650] to fix or establish any salary or allowance for their service, without the approbation and consent of the Overseers." This Resolve, being connected with others which the Governor did not fully approve, he gave only a conditional assent to; which manner of assent the House of Representatives remonstrated against. The Resolve, however, shows the sense of the General Court.

How long the Corporation have been in the practice of making grants and allowances to those employed in the government of the College, independent of the Overseers, we don't know; but we find in 1732, that the Overseers asserted their right in this matter, and ordered a copy of their vote to be delivered to the Corporation.

This practice of the Corporation is not only contrary to the College Charter, but contrary to the usage of all well-regulated societies, who never permit their officers to settle the quantum of their own salaries, and then pay themselves out of the common treasury. And the impropriety of such a practice the Corporation themselves

have been very sensible of, as appears by a memorial of theirs to the Governor and Council, signed by President Leverett, wherein they declare (though they think it belongs wholly to them to make allowances to those who do service in the College) that it is unreasonable the "major part of the Corporation should be of those who receive salaries or allowances from the College. In such cases, they think, none ought to carve for themselves." They also "think it contrary to the light of nature that any should have an overruling voice in making those laws by which themselves must be governed in their office work, and for which they receive salaries"; and consequently they must have thought (in order to be consistent) that it was contrary to the light of nature that any should have any overruling voice in settling the quantum of salaries which themselves were to have the sole benefit of.

By what is said above, we do not mean to detract from the merit of the Corporation, or to insinuate that they have made unreasonable grants or allowances to any of their own body; on the contrary, we esteem them gentlemen of honor and probity, and think the allowances that any of them have had much less than the nature of their office and their personal worth require.

Upon the whole, the Committee are clearly of opinion that the Corporation have no power to make allowances to those who are employed in the government of the College, without the consent of the Overseers; and they purpose that the following votes should be passed by the Overseers, viz.:—

1. That, according to the Charter aforesaid, the Corporation have no right to made allowances to persons employed in the government of the College, without the consent of the Overseers.
2. That the College Treasurer be directed for the future to pay no grants or allowances made to persons employed as aforesaid, till the consent of the Overseers be first obtained, and signified to him under the hand of their clerk.

Which is humbly submitted.

ANDREW OLIVER, *per order.*

13 May, 1761.

Copy. Attest,

ANDREW ELIOT, C. C.

No. V.

CORPORATION'S REPLY TO THE CLAIM OF THE OVERSEERS RESPECTING THE MAKING ALLOWANCES TO THE GOVERNORS OF THE COLLEGE, IN ANSWER TO THE OVERSEERS' COMMITTEE. MAY 13, 1761.

THE Honorable and Reverend Overseers of Harvard College having ordered the Corporation of said College to be served with a copy of a Report of a Committee appointed November 20, 1760, to consider whether it be in the power of the Corporation to make allowances to those who are employed in the government or instruction of the College, without the consent of the Overseers: we, the President and Fellows of said College, have carefully perused the said Report; and apprehending it to be grounded entirely upon a mistake of the meaning of one clause in our Charter, we think ourselves in duty bound briefly to represent some of the reasons of such our apprehension.

To us, then, it seems evident, from the situation in which our Charter hath put us, that it belongs solely to the President and Fellows of Harvard College to make such disposals of the goods and revenues of the College as they judge to be according to the will of the donors.

For they are liable to be sued in all courts and places of judicature within the jurisdiction of the Province of the Massachusetts Bay; and to some of their benefactors they have given bonds, by virtue of which their benefactors' heirs in all future times are empowered to sue for and recover the donations of their ancestors, if not disposed of according to the donor's will. Now, how great an hardship would it be upon any body corporate to be liable to be sued in courts of judicature, for not disposing of goods or sums of money according to the donor's will, supposing another body of men, who are not liable to be sued, have power to put a negative upon any of their disposings.

'Tis true the Honorable and Reverend Committee of the Overseers, in their Report, seem to carry this negative power no further than to *allowances made to persons employed in the government of the College*. But if the Committee have not mistaken the meaning of the paragraph in the Charter upon which they ground their argu-

ment, this negative power must be extended much farther, even to all disposings of the goods and revenues of the College whatsoever, and to several other things, which we apprehend big with absurdity, if not contradiction. Whereas, if we understand the passage right, it contains nothing inconsistent with the practice we have been always in, nor are there any difficulties involved in it.

To set this matter in a proper light, it will be needful to rehearse the whole paragraph, which is as follows:—

“And for the better ordering the government of the said College and Corporation, be it enacted by the authority aforesaid, That the President and three more of the Fellows shall and may, from time to time, upon due warning, or notice given by the President to the rest, hold a meeting for the debating and concluding of affairs concerning the profit and revenues of any lands, and disposing of their goods. Provided, that all the said disposings be according to the will of the donors. And for direction in all emergent occasions, execution of all orders and by-laws, and for the procuring of a general meeting of all the Overseers and Society in great and difficult cases, and in cases of non-agreement. *In all which cases aforesaid*, the conclusion shall be made by the major part, the said President having a casting voice, the Overseers consenting thereunto.”

This paragraph seems to have some obscurity in it; but one inquiry well answered will easily fix its meaning. The only question is, how far those words, “*in all which cases aforesaid*,” may be supposed to refer back? If they have a retrospect so far as the honorable Committee think they have, then it is plain,—

1. That the Corporation *can conclude no affair touching the profit or revenue of any lands*. They cannot determine for what rent a piece of land may be leased, nor can they give a lease of it, without the consent of the Overseers.

2. Without such consent, they can make no disposal of their goods, how agreeable soever such disposings may be to the will of the donor,—not so much as an allowance of forty shillings to a poor scholar at Salem or Dorchester. And if (as it is the case in many instances) the person or persons to whom such disposings are to be made, are plainly described and pointed out in the will of the donor, yet the Overseers will have it in their power to put a negative upon such disposal, and thereby render the Corporation obnoxious to a prosecution in law from the donor or his heirs, for not doing what the Overseers may have put it out of their power to do.

3. *No direction can be given upon any emergent occasions*, till the Overseers have consented thereunto, though the nature of emergencies is often such as requires that some proper direction should be given immediately.

4. *No order or by-law can be executed*, without the Overseers' consent ; which is to suppose that the whole legislature of the College must come together and consent in the execution of every law. Finally, —

5. *No general meeting of the Overseers can be procured*, till they have come together (by what means we cannot tell), and consented to have such a meeting.

All these things, we apprehend, lie much plainer in the paragraph which hath been read, than *that the Corporation have no right to make allowances to persons employed in the government of the College, without the consent of the Overseers* ; concerning which we cannot find one word here. Nor do the honorable Committee attempt to deduce it from anything here, otherwise than by a pretty remote consequence. We say this upon supposition of what we can by no means persuade ourselves to believe, viz. that the Committee were not mistaken when they understood the words, *in all which cases*, to refer to the two first things contained in the paragraph before us, upon which they ground their argument. For if the two first things mentioned in this paragraph of our Charter are among the cases referred to, be sure all that follow must be so too. And upon that supposition, nothing can be plainer, than that the consent of the Overseers, in all the instances which have been mentioned, must be necessary. But to suppose that the Corporation cannot settle the rent of a piece of land, or give a lease of it ; that they cannot dispose of forty shillings to a poor scholar pointed out by the donor ; that they can give no direction upon any emergent occasion ; that no law or order can be executed, nor any general meeting of the Overseers procured ; — to suppose that none of these things can be done without the consent of the Overseers, would so perplex and embarrass all the affairs of the College, and render such frequent meetings of the Overseers necessary, that we cannot think the passage under consideration was ever so intended, or ought to be so understood, especially since there is another natural and easy construction of it which removes all these difficulties.

We suppose, then, that the words, *in all which cases*, refer no

farther back than to the *cases* just before mentioned, which may sometimes happen to be numerous enough, viz. *great and difficult cases, and in case of non-agreement. In all such cases the Corporation is to procure a general meeting of the Overseers' Society, and the conclusion shall be made by the major part, the President having a casting voice, the Overseers consenting thereunto.* If this easy construction be the true one, as we are persuaded it is, all seeming obscurity and difficulties are removed, and there is no foundation in the paragraph before us, nor, we think, anywhere else in the Charter, for the Report of the honorable Committee. But the practice of the Corporation hath been regular, and agreeable to the Constitution, and not contrary to the usage of all well-regulated societies. For, if we are not greatly mistaken, the General Assembly of this Province *settle the quantum* of their own reward for their public service, and are paid out of the common treasury."

No. VI.

AT a stated meeting of the President and Fellows of Harvard College, in Boston, November 27, 1852:—

Chief Justice Shaw made the following Report on the subject of the Treasurer's Salary, which was accepted.

THE COMMITTEE TO WHOM WAS REFERRED THE SUBJECT OF ATTACHING A COMPENSATION TO THE OFFICE OF THE TREASURER, RESPECTFULLY REPORT:—

THAT from the records it appears that it was usual to make such compensation, in the form of an annual salary, or by especial grants of money, up to the year 1827, when the office was conferred upon an eminently wealthy merchant, who rendered the service gratuitously for the space of three years; that it was then given to a successor, also of great wealth, who performed its duties in like manner for the period of twelve years; and was then entered upon by the present Treasurer, who has now discharged this onerous trust, without other recompense than the consciousness of service thus gener-

ously rendered, for the past ten years. That the services, thus gratuitously given, have been most faithfully and honorably performed, involving great expenditures of time and knowledge, and under heavy moral responsibilities, which entitle all these gentlemen to the lasting gratitude of the College.

The properties of the College, however, have been of late years much increased in number and value, and are prospectively soon to be augmented; and its affairs, and especially those pertaining to the Treasurership, owing to the multiplicity of the schools and departments, and increase of officers and students, have become multifarious and complicated, and the suitable investment of its personal estates involves constantly increasing demands upon the time, financial skill, and responsibilities of the Treasurer. While, at the same time, the general superintendence of the real estates, naturally falling within the scope of his duties and operations, and the sales and management thereof devolving upon him, constitute further and very frequent and urgent claims upon his care and attention.

In view of these considerations, the Committee are of opinion that it is altogether unreasonable to expect that the services of an office so laborious, and involving the exercise of so much skill, and under such great responsibilities, should be rendered gratuitously.

And they are further of opinion, that a just sense of responsibility on the part of any one who may occupy that station, and a suitable readiness on the part of the Corporation to exact a careful and strict performance of its duties, and exact remuneration for loss arising from any omission of them, would be more fully secured by attaching to their discharge a reasonable reward, than by the receipt of it as a favor rendered.

The Committee, for these reasons, are of opinion that a permanent salary should be attached to this office; and, upon consideration of the amount of personal property in the Treasurer's keeping, and of the annual income and its expenditure, and the compensation usually allowed to trustees, and by courts of law and probate, for like services,—and the incidental services rendered by him in the affairs of the College,—are satisfied that one of fifteen hundred dollars annually, payable in quarterly instalments, with such further sum annually for office rent, clerk hire, and incidental ex-

penses as may be found necessary, would be a suitable allowance. And they recommend that the same be henceforth allowed and paid, commencing the first payment at the expiration of the first quarter of the present academical year.

All of which is respectfully submitted.

JARED SPARKS,
LEMUEL SHAW,
CHARLES G. LORING.

No. VII.*

AT a Meeting of the BOARD OF OVERSEERS OF HARVARD COLLEGE, held in the Senate Chamber, in Boston, on the 31st day of January, 1856, his Excellency the Governor in the Chair, the Hon. GEORGE MOREY presented the following

R E P O R T .

THE COMMITTEE OF THE OVERSEERS OF HARVARD COLLEGE, APPOINTED ON THE 12TH OF APRIL, 1855, TO CONSIDER AND REPORT ON THE RELATIVE POWERS, DUTIES, AND RESPONSIBILITIES OF THE PRESIDENT AND FELLOWS, AND OF THE OVERSEERS OF HARVARD COLLEGE, MORE ESPECIALLY IN RELATION TO APPOINTMENTS, TENURE OF OFFICE, SALARIES, AND FINANCES, HAVE CONSIDERED THE MATTERS REFERRED TO THEM, AND RESPECTFULLY SUBMIT THE FOLLOWING REPORT.

WHEN the resolution, under which the Committee was appointed, was adopted, the Board could hardly have been aware how exten-

* The Report of the Committee of the Board of Overseers, which has given rise to this discussion, is continually referred to, and a large proportion of it cited, in this Report. To enable the reader to judge of the fairness of these references and citations, the whole of that Report is, with the consent of the Committee of the Overseers, herewith annexed. The paging of the original edition is given in brackets immediately before the first word of the page.

sive was the field of inquiry which the Committee were required to examine, or how imperfectly the same had previously been explored. It is somewhat remarkable, considering the various and important relations which exist between the Corporation and the Overseers, that from the beginning down to the present time, embracing a period of more than two centuries, not a single question touching the relative [4] powers, rights, or duties of these two Boards has, so far as the Committee can learn, been brought to a legal decision, or been solemnly argued, or even presented by both parties in proper form for argument and adjudication.

The Committee, therefore, for this and other reasons, which will appear in the course of this Report, are brought to an examination and consideration of the several Acts, by which these two Boards were established, and of the other Acts supplementary thereto, with less aid in the construction thereof than might have been expected.

With these preliminary observations, the Committee will proceed to examine and consider the legislative Acts, by which the powers, rights, and duties of the two Boards were originally conferred and prescribed.

In the year 1642, the first Act was passed, creating a Government over this Seminary at Cambridge, which was entitled, "The Act establishing the Overseers of Harvard College." This Board consisted of the Governor and Deputy Governor, all the Magistrates of the Colony of Massachusetts, and the Teaching Elders of the following towns, viz.: Cambridge, Watertown, Charlestown, Boston, Roxbury, and Dorchester, together with the President of the College.

It could hardly have been expected, that a system so cumbrous would long continue without some important change; and we find that the Colonial Legislature, in the year 1650, did proceed to pass an Act, commonly denominated the Charter, by which a Corporation was created, consisting of a [5] President, five Fellows, and a Treasurer, upon whom and their successors all such powers were conferred as it was supposed the safety of the funds and the successful management thereof,—the prosperity and good of the College, would require; and the title to all lands and other property of the College, then existing, or which might be afterwards acquired, was vested in the said Corporation, which, being a small, and to a cer-

tain extent an independent body, would be able safely and satisfactorily to manage its pecuniary affairs. This was deemed a matter of great importance; for, prior to this time, although it was supposed such lands and property were held in trust by the Colony, yet it was somewhat doubtful where the title to the same actually rested; and if in the Colony, the depositary or trustee could not but be regarded as less suitable and satisfactory than the one established by said Charter.

By this Act said Corporation is empowered to purchase, or otherwise acquire, real estate or personal property, and hold the same for the use and behoof of the President, Fellows, scholars, and officers of said College. It is also enacted in said Charter, that the said Corporation, or the major part of them, "may meet and choose such officers and servants for the College, and make such allowance to them, and them also to remove, and, after death or removal, to choose such others, and to make, from time to time, such orders and by-laws for the better ordering and carrying on the work of the College, as they shall think fit; *provided, the said orders be allowed by the Overseers.*"

And it is further provided by said Act, that the [6] President, and three more of the Fellows, may hold a meeting for the debating and concluding of affairs concerning the profits and revenues of any lands, and disposing of their goods, &c.; in all which cases aforesaid, the conclusion shall be made by the major part, the said President having a casting vote, *the Overseers consenting thereunto.*

By this Act some powers are granted to the President and Fellows to be exercised by them alone, and many other powers are conferred upon them and the Overseers; that is, the President and Fellows, in all such cases taking the initiative, may pass an ordinance or by-law, make an appointment, vote salaries, &c., and send the record of their doings to the Overseers for their approval, which, being assented to and confirmed, become complete and valid acts.

It was soon found that great delay and inconvenience were suffered on account of the difficulty of procuring meetings of such a body as the Board of Overseers, the members thereof being numerous and scattered over the whole Colony; and the consequence was, that much time might elapse after the adoption of any measure

by the Corporation, before it could go into effect, for want of confirmation by the Overseers. These and other evils gave rise to an Act, called the Appendix to the College Charter. This Supplementary Act of the Colonial Legislature was passed on the 14th of October, 1657, and its provisions are as follows, viz.:—

“The Corporation shall have power, from time to time, to make such orders and by-laws, for the [7] better ordering and carrying on the work of the College, as they shall see cause, without dependence upon the consent of the Overseers foregoing. PROVIDED ALWAYS, *that the Corporation shall be responsible unto, and those orders and by-laws shall be alterable by, the Overseers, according to their discretion.*

“And when the Corporation shall hold a meeting for agreeing with College servants, for making of orders and by-laws, for debating and concluding of affairs concerning the profits and revenues of any lands or gifts, and the disposing thereof (provided that all the said disposals be according to the will of the donors), for managing of all emergent occasions, for the procuring of a general meeting of the Overseers and Society in great and difficult cases, and in cases of non-agreement, and for all other College affairs to them pertaining;—in all these cases the conclusion shall be valid, being made by the major part of the Corporation, the President having a casting vote. PROVIDED ALWAYS, *that, in these things ALSO, they be responsible to the Overseers AS AFORESAID.*

“And in case the Corporation shall see cause to call a meeting of the Overseers, or the Overseers shall think good to meet of themselves, it shall be sufficient unto the validity of College acts, that notice be given to the Overseers in the six towns mentioned in the printed law, anno 1642, when the rest of the Overseers, by reason of the remoteness of their habitations, cannot conveniently be acquainted therewith.”

The Charter of 1650 was granted on the petition [8] of Henry Dunster, who was thereby made President of the Corporation; but the Act of 1657 appears to have been passed on “certain proposals of the Overseers.” The latter Board probably wished to be relieved from the necessity of frequent meetings, and to be able to call such meetings as they desired to hold, with more facility and convenience; and the Corporation was made a more efficient body by virtue of the provisions in this Appendix.

Under this Act many of the votes of the President and Fellows go into immediate effect, without dependence upon the consent of the Overseers, respecting which votes the latter Board previously possessed what may be called, for the purpose of distinction, the right of *confirmation*; and until such confirmation took place, the said acts of the Corporation did not become valid. Still it is provided by said Appendix, that the Corporation shall be responsible unto, and such votes or doings are made alterable by, the Overseers, according to their discretion. This may be denominated the right of *revision*, which, though less direct than the right of *confirmation*, yet, being extended to various acts and doings of the Corporation, seemed not only to furnish a sufficient security for the correction of errors, but to give to this Board all necessary control, and even a larger one than existed before.

The Corporation, however, seemed for a time to be gainers by this additional legislation, inasmuch as, while more of their votes went into operation at once, no express provision was made, requiring them to send such votes to the other Board. In [9] consequence thereof, the Corporation kept close upon their books most of their doings, and it sometimes happened that important votes or orders were unknown to the Overseers for years.

At length the Overseers, whenever they desired to have possession of a particular vote of the Corporation, proceeded to send a formal order or request to that body for the same. The Corporation of course duly submitted to the call, and furnished the vote required. A more suitable remedy might have been provided by the adoption of special joint rules by the two Boards, regulating the transmission of the votes or orders of the Corporation to the Overseers.

The Committee will now proceed to consider the four particular matters specified in the resolution or vote of this Board, adopted April 12, 1855; and this they will do in such order as they find most convenient. The first subject, to which they will call the attention of the Board, is that of the College Finances.

The Funds of the College are under the immediate charge of the Treasurer, who is subject to the orders and special directions of the Corporation; and a detailed statement of the condition of said funds, and of all receipts and expenditures, is made annually by the Treasurer to the Government of the University, which is examined by a

Committee of the Corporation and Overseers, whose certificate or report is presented to the Overseers at their annual meeting. It has not been the practice of the Corporation to make any separate communication to the Overseers of their doings in relation to the [10] finances. Still, if the Corporation should at any time have in contemplation some unusual financial operation, such as disposing of the real estate, in whole or in part, belonging to the College, or erecting a new College hall or chapel, or adopting some important change respecting the College funds, it would seem fit and proper that they should, before any action is taken by them, make known their intentions to this Board, so that the Overseers might express their approval thereof, or interpose their objections, if they had any, to the plans of the Corporation. In this way the provisions of the constitution of the College would not fail to be complied with, and the Overseers would be sure to have an opportunity to exercise all the rights and powers which may belong to them.

In this connection the Committee deem it proper to add some remarks respecting Donations made to the College.

If a simple bequest, or gift, without any qualification or condition, be made to the College, of a sum of money, the Overseers may well have a right to expect that the Corporation will give them official notice of the same; although, under ordinary circumstances, it might not be deemed a matter of any great importance. But when the donation is upon a particular condition, or is accompanied by a special trust, the Committee are persuaded that the vote of acceptance by the Corporation is not sufficient and complete until such vote is concurred in by this Board. Otherwise the Overseers might be obliged, or compelled by an order of court, to aid in the execution of a trust, which they have not [11] sanctioned, nor ever would have consented to, if the same had been laid before them for their approval.

The Committee, therefore, are of opinion, that it is the duty of the Corporation to submit to this Board the question of the acceptance of every donation accompanied by a special trust, or imposing some particular obligation upon the government of the College. It appears by the records of this Board, that the proposal of Mr. Hollis to endow a Professorship of Divinity was by the Corporation laid before the Overseers, who expressed much gratification on the occasion, and appointed a committee to prepare an appropriate letter of

thanks to this distinguished benefactor of the College; and at divers times, questions respecting donations have been presented to the Overseers, and acted upon by them, and votes of thanks to the donors have often been passed.

For the purpose of further showing what has been the practice in this respect, the Committee think proper to cite the following cases, viz.: In the year 1791, the President laid before the Corporation a letter from James Bowdoin, Esq., stating that his father, the Hon. James Bowdoin, deceased, had by his last will bequeathed to the University a legacy of £ 400, the interest of which was to be applied in the way of premiums for the advancement of useful and polite literature among the residents, as well graduates as undergraduates, of the University, and that the executors were ready to pay the same; whereupon it was voted to accept the aforesaid legacy upon the conditions pointed out by the testator, and that Ebenezer Storer, Esq., [12] the Treasurer of the University, receive the same. This vote of the Corporation being presented to the Overseers, it was voted to concur with the Corporation in accepting this legacy, and appointing the Treasurer to receive it. A committee of the Overseers was then appointed to consider what was proper to be entered on their records relative to Mr. Bowdoin's legacy; which committee, at a meeting of the Overseers, held May 3, 1791, made a report, and recommended the adoption of the following vote, viz.: "*Voted*, That this Board have a due sense of Hon. Mr. Bowdoin's attachment to the interests of virtue and science in general, from a series of important services in the course of his life, and to the prosperity of the University in particular, from his uniform exertions to promote its welfare while living, and from his liberal donation to it which he made in his last will and testament." Which report and vote were adopted by the Board.

In the year 1814, the Corporation passed the following vote, viz.: "*Voted*, That the documents relating to the donation of Samuel Parkman, Esq. of a township of land for the purpose of promoting the interests of religion and science, and of religious and scientific education in the University, with the vote of the President and Fellows on the subject, be laid before the Honorable and Reverend, the Overseers, and they be requested, if they see fit, to concur in said vote. This vote was laid before the Overseers and concurred in.

In the year 1829, the following vote was adopted by the Corpo-

ration, Judge Story being then a member, viz.: *Voted*, That this Board accept the donation [13] of the Hon. Nathan Dane, for founding a Professorship of Law, on the terms and conditions set forth in his communication to the Corporation, dated June 2, 1829; and that the above proceedings be laid before the Overseers, that they may approve the same, if they see fit. This vote, being laid before the Overseers, was concurred in.

In the course of the last year some important questions came before this Board respecting a liberal donation made to the College by Miss Caroline Plummer, of Salem, who, by a codicil to her last will and testament, made provision for establishing a new Professorship in the University. No vote of the President and Fellows, accepting said donation, was laid before the Overseers for their concurrence, the subject being first brought to their notice by the presentation to them by the Corporation of certain rules and statutes of the proposed professorship, and of the name of a candidate to fill the same. The whole subject was then referred to a very able committee, consisting of five distinguished gentlemen of this Board, of which committee Hon. Robert C. Winthrop was Chairman, and a munificent benefactor of the College, the late lamented Mr. Lawrence, was a member.

After much consideration, the committee made an elaborate report, recommending among other things that the Overseers should concur with the Corporation in the acceptance of said bequest, and in the establishment of a new Professorship, agreeably to the terms thereof. This report was adopted with great unanimity. The language and action of said committee may be regarded as a distinct [14] expression of opinion by them, that every donation accompanied by a trust should be laid before the Overseers for their consideration, and be acted upon by them.

The Committee will now proceed to say a few words on the subject of Appointments.

This seems to have been regarded at all times as a matter in relation to which the action of the Corporation did not take effect until the same was confirmed by the Overseers. The Corporation have therefore uniformly sent their votes or orders, by which appointments have been made, to this Board for approval.

It is often found convenient, and even necessary, that tutors and some other officers, chosen by the Corporation to fill vacancies,

should enter on the discharge of official duties previous to the action of the Overseers on such election ; and if an instructor or officer so elected should fail to be confirmed, it seems reasonable that he should receive the salary attached to the office up to the time of such adverse decision of this Board.

It has been a frequent practice, when a new Professorship or other office is established by the Corporation, for them to send a record of their action on the subject to this Board, and at the same time present a vote, appointing on their part some person to fill the office. This is deemed by the Committee an irregularity, and may be a source of much embarrassment and difficulty. The Committee, therefore, trust the Corporation will not hereafter proceed to an election to fill an office, till its establishment has received the approval of this Board.

[15] The Committee will now briefly notice the subject of the tenure by which offices are held in the University. It may be considered, as a general rule, that the instructors or officers in the College hold their offices during the pleasure of both Boards, and may be removed by them. If, by a statute or vote of both Boards, a certain term or limited period is prescribed for an incumbent to hold any office, it is an irregularity for him to be permitted to remain in office after such term has expired. It is also clearly an irregularity for an appointee of the Corporation to continue as an instructor or officer after his nomination has been rejected by the Overseers.

The Committee have now reached the subject of Salaries, which is the only remaining topic specified in the resolution by which they were appointed.

It is provided in the Charter, in substance, as appears in the passage herein above cited, that the Corporation may meet and make such allowances to the College officers or servants as they shall think fit ; *provided*, their orders or doings on the subject be allowed by the Overseers. This provision is contained in the very section or part of the Act in which the matter of appointments is regulated, and that too by the same phraseology as is used touching salaries ; and it has never been questioned by the Corporation that all such appointments or elections require the confirmation of the Overseers. But the Corporation has, on some occasions, particularly during a considerable period immediately preceding the year 1761, pursued a course which indicated that in their opinion they

could, by virtue of the said Appendix to the Charter, prescribe salaries for the [16] College servants by votes or orders, which went into operation without the *confirmation* of the same by the Overseers. If the regulation of this matter has been changed by said Appendix, then to this extent a diversity has been created between the cases of *appointments* and *salaries*; — that is, in the case of the election of instructors and officers, the Corporation are obliged to send their votes to the Overseers for their confirmation or approval; and in that of salaries, there is no such necessity imposed by said Supplementary Act. The only course, therefore, for the Overseers to pursue, if such votes or orders have not been laid before them, and if they desire to take any action thereon, is to get possession of them by a call on the Corporation therefor, and then to revise such doings by approving or rejecting the same.

The Committee think proper in this place to say, what may seem to be a repetition, that the main, indeed almost the only object of said Appendix, was to enable the Corporation to adopt votes or orders, which would become valid without the confirmation thereof by the Overseers. A question has been raised whether said legislative act includes votes or orders relating to salaries. But it may be regarded as a matter free from all doubt, that if no clause of said Act applies to salaries, then all votes or orders on that subject require the confirmation of the Overseers, as it is provided in the Charter; but if any provision of said Supplementary Act does embrace votes or orders respecting salaries, (which is understood to be the opinion of some members of the legal profession,) then as to all such votes [17] or orders the Overseers clearly have the right of *revision*.

But it may be asked whether such right has not been lost by a continued practice in the course of one or two centuries, during which the Overseers may have abstained from all action in the matter. To this question the Committee do not hesitate to give a decided answer in the negative. Surely the omission of the Corporation, for ever so long a period, to communicate any order or vote upon salaries to the Overseers, or of the latter Board to call on the Corporation for the same, can never be considered as an abandonment of their right of control or revision. The only legitimate presumption to be derived from such omission is, that the doings of the Corporation in this respect, if known to the Overseers, were right, or rather that the Overseers were satisfied therewith.

Notwithstanding the confidence of the Committee in the doctrine above stated, yet as they are desirous of avoiding every possibility of mistake in such a case, and as some persons may have doubts, which it is desirable should be removed, the Committee have examined the records of the Overseers since the year 1707, at which time separate and proper records began to be kept of the doings of this Board. The Committee have no means of knowing what the practice was from 1657, the time of the enactment of the Appendix, to the year 1707; and nothing appears on the subject in the records of the Overseers till about the year 1722. During this long period, from 1657 to 1722, the number of instructors [18] or officers was small. The salaries also were small, and the means of payment precarious. Under these circumstances the probability would be that the Corporation would hardly be able to commit any serious mistakes as to salaries. The chief solicitude at that time related to the procuring of means to pay the small salaries granted, and the Overseers would not be likely to trouble themselves much about the votes of the Corporation as to the amounts.

From the early part of the year 1722, to November 20, 1760, the right of the Overseers to revise the votes of the Corporation, as to salaries, was at divers times agitated; and in a few instances the Corporation presented to the Overseers their votes, by which allowances were made to instructors, for their approval, and at several times a call was made on the Corporation by the Overseers to send to the latter Board their votes in relation to salaries and other subjects, which call was always promptly complied with on the part of the Corporation, and their votes were duly presented. This important point being fully settled, and the difficulty as to obtaining possession of the votes of the Corporation being removed, the Overseers, at their meeting on the 20th of November, 1760, took up the subject of salaries in earnest, and adopted the following vote, viz.: *Voted*, That there be a committee to consider whether it is in the power of the Corporation to make allowance to those who are employed in the government or instruction of the College, without the consent of the Overseers; and Secretary Oliver, [19] Mr. Bowdoin, Brig. Gen. Brattle, Mr. Pemberton, and Mr. Eliot were constituted the committee.

On the 11th of June, 1761, this committee made a report, which was read, and the 9th of July then next was specially assigned for

its consideration; and it was voted that the Corporation be served with a copy thereof.

On the 26th of the same month of June, the Corporation met and passed the following vote, viz.: *Voted*, That whatsoever salaries or grants shall be hereafter made to any of those who are in the Government of the College, shall be laid before the Overseers for their consent, and that this vote be presented to them for their approbation. By this action of the Corporation, they clearly gave up the great question in controversy, and in fact seem to have admitted it to be essential to the validity of their votes or orders respecting salaries and allowances, that the same should receive the consent of the Overseers. On the 9th of the following July, the time assigned for the consideration of said report, this vote of the Corporation was laid before the Overseers, which was read and consented to, "it appearing," as the record states, "to this Board to be agreeable to the College Charter."

On the 7th of September, 1761, the Corporation passed the following votes, which were transmitted to the Overseers, and laid before them at their meeting on the 6th of the succeeding October, viz.:—

1st. That the salaries of the Professors, Tutors, and Hebrew Instructors be as follows:—

[20]	Salary of the Divinity Professor,	£ 36 18 8
"	" Mathematical Professor,	78 11 2½
"	" First Tutor,	61 6 8
"	" Second do.	60 0 0
"	" Third do.	59 6 3
"	" Fourth do.	58 13 4
"	" Treasurer,	40 0 0

Vote 2d. That a grant of eight pounds be made to the Treasurer this year, in addition to what is his stated salary.

Vote 3d. That one shilling and four-pence be allowed by each student of the two lower classes to the Hebrew Instructor, to be charged in their quarter bills.

Vote 4th. That the salary of the Clerk of the Overseers be six pounds per annum.

From this time down to about the year 1811, that is, for a period of half a century, all the numerous votes of the Corporation, establishing the salaries annually, or making any special grants to instructors or officers, were uniformly presented to the Overseers for

their approval, and, what deserves to be particularly mentioned, were in every instance consented to and allowed by the latter Board. Such, then, was the universal rule during a part of the administration of President Holyoke, the whole of the time in which Presidents Locke, Langdon, Willard, and Webber were in office, and the first year of the Presidency of Dr. Kirkland.

On the 26th of November, 1810, the following votes were passed by the Corporation, prescribing the salaries of all the instructors and officers of the College, and making divers special grants, which [21] votes were laid before the Overseers for their approval, December 6th, 1810, viz.:—

“ *Voted*, That there be granted to the Rev. Dr. Lathrop, for his services as Chairman of the Board, whilst the office of President was vacant, the sum of fifty dollars.

“ *Voted*, That there be granted to Professor Ware, for his services in assorting and filing the papers belonging to the College, and which were in the custody of the late President at his decease, the sum of twenty-five dollars.

“ *Voted*, That there be granted to Mr. Hedge sixty-five dollars for his services in performing the chapel duties during the late vacancy of the office of President.

“ *Voted*, That there be allowed to the administratrix of the estate of the late President Webber the salary for the quarter in which he died, deducting two hundred and seventy-six dollars, being the expenses incurred by the Board during that quarter for services appertaining to the office of President.

“ *Voted*, That there be granted to Professor Ware, for his services and expenses in discharging duties appertaining to the office of President during the late vacancy of that office, three hundred and fifty dollars, the fees he received for degrees being considered a part of that sum.

“ *Voted*, That the salaries last granted to the present Officers of the College,—that is to say :

[22] To the President,	\$ 2,250
The Secretary of the Overseers,	60
The Treasurer,	720
Hollis Professor of Divinity,	1,500
Hollis Professor of Mathematics, &c.	1,500
Hancock Professor of Hebrew and other Oriental Languages,	1,500
Boylston Professor of Rhetoric and Oratory,	1,500

College Professor of Logic, Ethics, and Metaphysics,	\$ 1,500
To the several Tutors within the walls, viz.: Messrs. Levi Frisbie, Ashur Ware, and William Pitt Preble, each	660
The Librarian,	550
The two Proctors, each	150

be their annual salaries, to be paid to them quarter-yearly, until the same shall be altered by this Board, with the approbation of the Board of Overseers."

This last vote was passed during the first year of the Presidency of Dr. Kirkland; and it is apparent that the intention was thenceforth not to prescribe annual salaries for the instructors and officers at the commencement of each financial year, as the custom had been, but to fix the same permanently, that is, by an order or vote, with a provision that the same should not be altered except by the concurrent action of both Boards. None of these salaries, so established as aforesaid, appear to have been changed, by virtue of any act of both Boards, in accordance with the terms of the above-mentioned vote.

The Committee, in a cursory examination of the records from the beginning of the year 1811 to the present time, have noticed not more than three or four instances in which votes adopted by the Corporation [23] respecting salaries have been presented by them to the Overseers for their consideration and approval.

Thus, then, the right of confirmation or revision, on the part of the Overseers respecting the votes and doings of the Corporation in relation to salaries and allowances to instructors and officers, was not only acknowledged in the year 1761 in a formal and solemn manner by the President and Fellows, but has been fully confirmed by the practice since that time.

The Committee requested the Treasurer to furnish to them a list of the present instructors and officers of the College, with the amount of the salary paid to each during the past year, appended to his name. The Treasurer very promptly complied with this request. They have not, however, found it convenient to make such particular inquiries respecting the several salaries specified in said list, as to enable them to form a very satisfactory opinion concerning the same; but the impression derived from this cursory examination is, that these salaries, as to the amount in each case, are suitable and proper in every instance but one, and that is the salary paid to the Treasurer.

It is believed that the allowance to the Treasurer has always been small. It appears by the vote heretofore cited, fixing the amount for the year 1761, that the regular salary of the Treasurer was forty pounds only, that is, about the sum of one hundred and thirty-three dollars.

Judge Davis held this office from 1810 to 1827, a period of seventeen years, and he received during [24] the whole time seven hundred and twenty dollars per annum, that being the salary fixed by the vote passed as aforesaid the latter part of the year 1810. He received nothing on account of the expense of clerk hire, rent of office, &c., and one of the Committee happens to know that Judge Davis employed a clerk, for whose services and other expenses he actually paid the whole of said sum of seven hundred and twenty dollars. He therefore, *in fact*, received nothing for his services as Treasurer.

From the year 1827 to 1852, a period of twenty-five years, the office of Treasurer was held three years by Ebenezer Francis, Esq., twelve years by Thomas W. Ward, Esq., and ten years by Samuel A. Eliot, Esq.; and during the whole time about eight hundred dollars were applied annually to the payment of the amount of clerk hire and other necessary expenses in the office of the Treasurer, but no compensation was paid, *in fact* or *in form*, to the Treasurer for his own services, the same being rendered by him gratuitously. And it appears (as the Committee understand) by various votes of thanks and other resolutions, unanimously adopted by the Corporation, that in the opinion of the members of that Board the duties of Treasurer were never more promptly, efficiently, and satisfactorily performed, than they were during said period of twenty-five years.

The Committee, therefore, are surprised to learn that the Corporation did, on or about a year prior to the resignation of Mr. Eliot, viz. about November 27, 1852, pass a vote, directing a salary of [25] fifteen hundred dollars to be paid to the Treasurer, which was over and above the usual allowance to him of about eight hundred dollars per annum, for expenses of clerk hire, rent of office, &c. Under such circumstances, it is difficult to comprehend for what reason said order or vote was adopted.

The Committee have no doubt that there are many highly respectable gentlemen in this community, of perfect responsibility and every way qualified for the situation, who would take this office,

being one of high honor and dignity, and discharge its duties faithfully and satisfactorily without compensation. They therefore cannot, without further information than they have been able to obtain, perceive any good reason why the Government of the College may not save this sum of fifteen hundred dollars every year.

The vote, by which the Corporation undertook in 1852 to attach a salary of fifteen hundred dollars to the office of Treasurer, has never been presented to this Board; and the passing of the same by the Corporation furnishes, in the opinion of the Committee, pregnant evidence of the propriety of its being insisted upon by the Overseers, that they should have an opportunity to pass judgment upon every vote of the other Board in relation to salaries and allowances to officers and instructors.

As the above-mentioned vote, which was passed in 1810, fixing the compensation of the Treasurer at seven hundred and twenty dollars, without any allowance for clerk hire and other expenses, has never been repealed or modified by both Boards, it is difficult to perceive why *that* sum should not be [26] regarded as the amount of his legal salary. The Treasurer, however, has for the last three years received about eight hundred dollars for clerk hire and other expenses each year, and as compensation for his services, the further sum of fifteen hundred dollars per annum. This surely is contrary to the aforesaid vote or order, adopted in 1810, which by its express terms was not to be altered, except by a vote of the Corporation, with the approbation of the Overseers.

The Overseers must always be anxious that the Corporation should exercise all the powers conferred upon it by the Constitution of the College, and that the efficiency of that Board should be preserved unimpaired, and all its rights and powers maintained in their original integrity.

The Corporation is certainly a very important body, and has on many trying and difficult occasions, during a period of two centuries, been the bulwark of the College. A large number of able, honorable, and patriotic men have held seats in that Board, and the Presidential chair has been occupied by a long line of wise and venerable men, and never by one of more practical wisdom and more deserving the confidence of the friends of the College than the present incumbent.

The Overseers surely can have no desire to assert any rights, or

claim any powers, which have not manifestly been conferred upon them. The Corporation, being a small body, and for that reason better qualified to manage all *business affairs* of the College, and to discharge every function of an *executive character*, it must be left to them to perform substantially [27] all such duties as they have performed heretofore. Nothing will tend more to the promotion of harmony between the two Boards, than a manifestation, at all times, of readiness on the part of the Corporation to communicate to the Overseers all such votes and information as they ought, or may desire to have.

And while the Overseers should never manifest a disposition to interfere improperly in any matter whatever, or to do anything which will be likely to embarrass the Corporation, yet it is the duty of this Board to exercise every power which clearly belongs to it under the Constitution of the College.

The Committee will only add, that they have prepared a Resolve, accompanying this Report, the object of which is that a few simple, joint rules should be prepared by a Committee of the Corporation, and a Committee of the Overseers, to be submitted to the two Boards respectively, by which the several irregularities herein considered, or referred to, may be corrected, and by which the respective powers, rights, and duties of the two Boards may at all times be recognized and enforced.

All which is respectfully submitted by

GEORGE MOREY,
SAMUEL HOAR,
G. W. BLAGDEN,
H. B. WHEELWRIGHT.

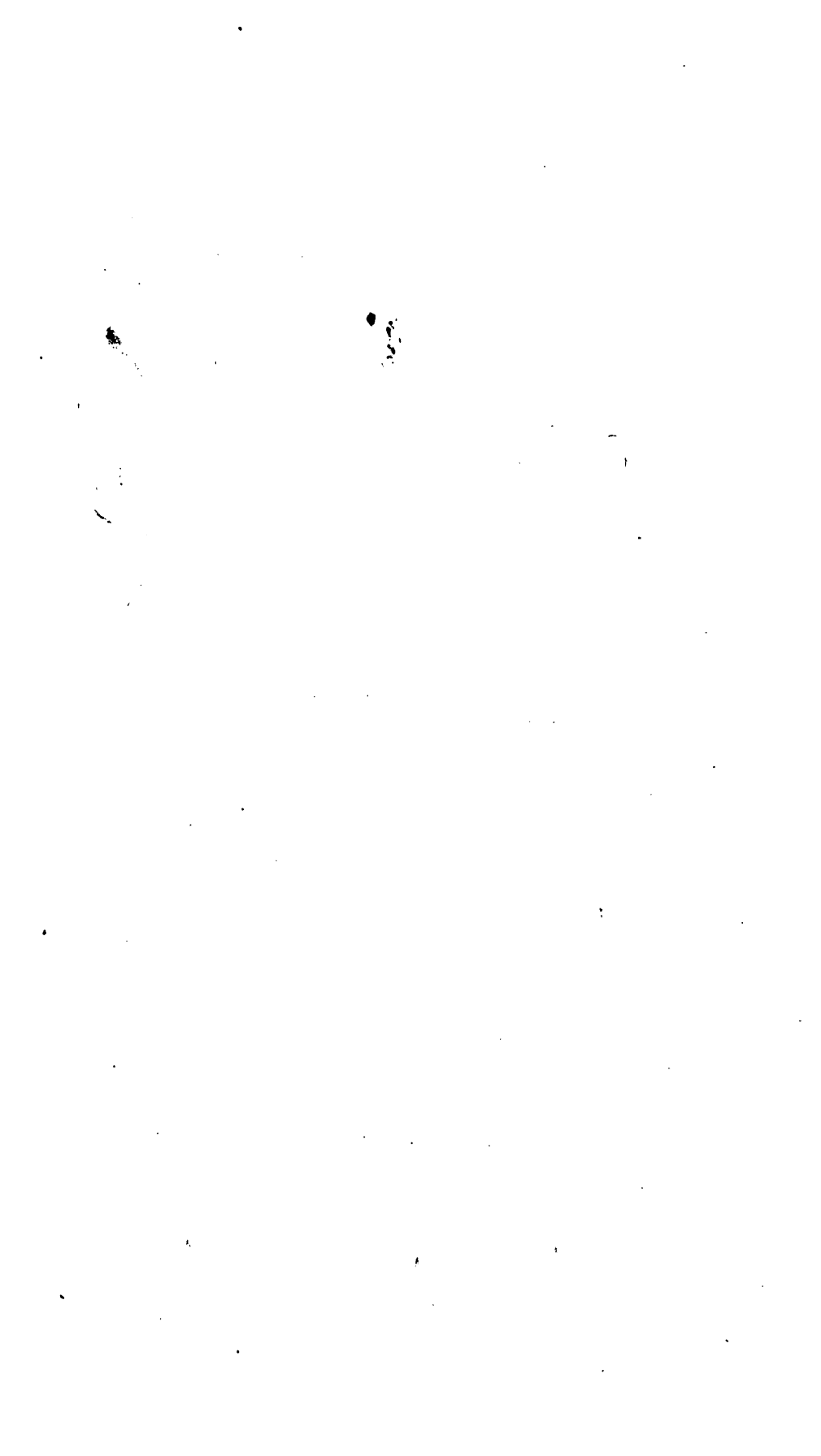
Boston, January 31, 1856.

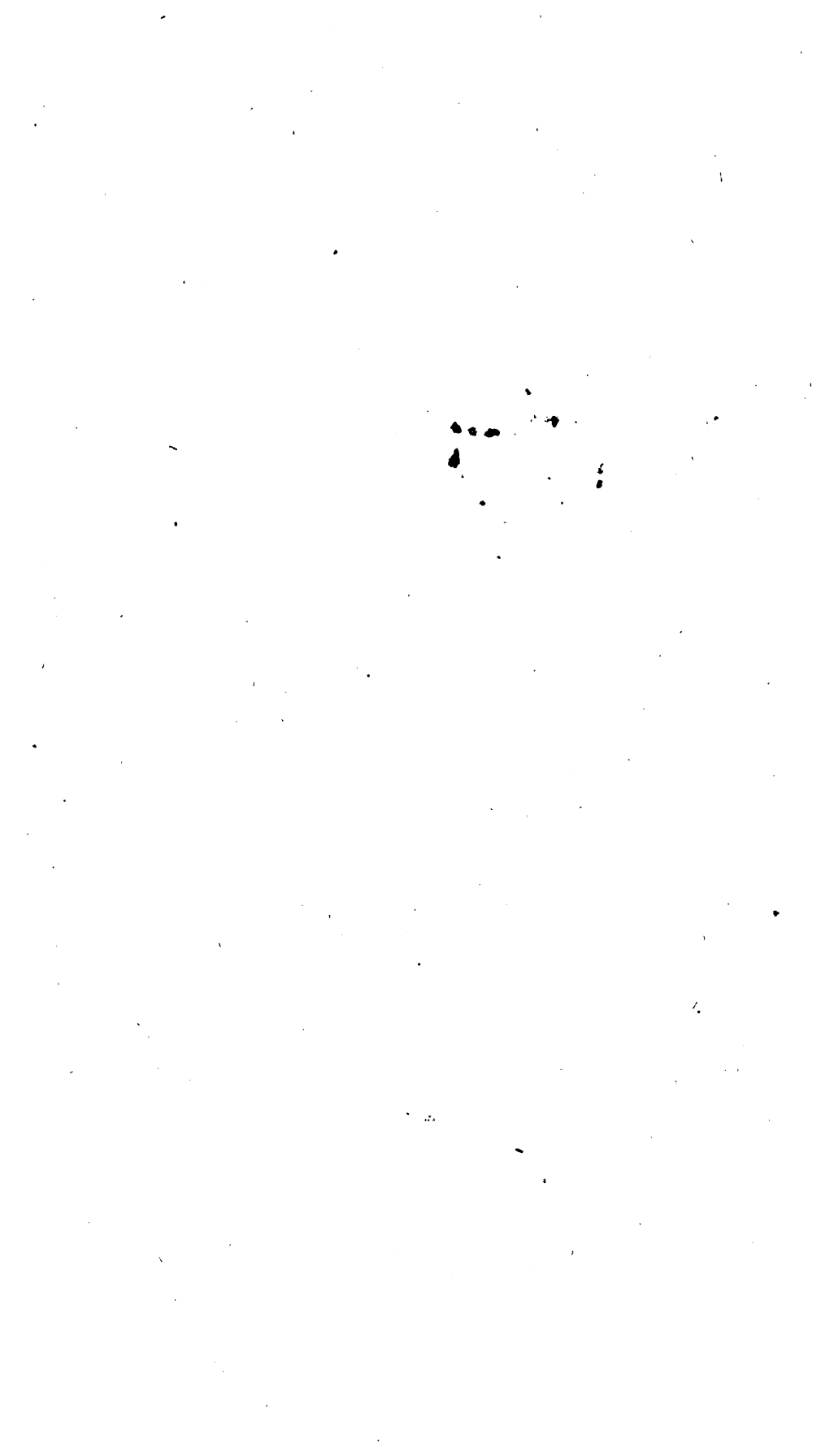
[28] The foregoing Report, having been read and considered, was accepted without a division.

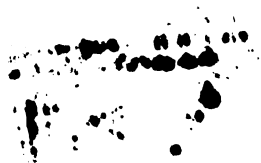
Mr. MOREY, in behalf of the Committee, then presented the Resolve referred to in the concluding part of said Report, which being read, and the blank therein being, on motion of Hon. THOMAS RUSSELL, filled with the names of the members of the Committee who made the Report, was adopted as follows:—

*In Board of Overseers of Harvard College, }
January 31st, A. D. 1856. }*

Resolved, That Hon. George Morey, Hon. Samuel Hoar, Rev. George W. Blagden, and Henry B. Wheelwright, Esq., be a Committee to confer with a like Committee of the President and Fellows, and agree upon such suitable Joint Rules as shall secure to the two Boards, as far as it may be practicable, their respective rights;—especially such Rules as shall regulate the intercourse between them, and provide for the prompt transmission of all such Votes of the Corporation to the Overseers as they may have a right to confirm or reject, revise or take action upon, or of which it may be fit and proper they should have possession and official knowledge; and said Committees shall report the result of their conferences and deliberations to their respective Boards.









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